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Status: GRANTED

Title: National Private Truck Council, Inc., et al., Petitioners
v.
Oklahoma Tax Commission, et al.

Docketed:
October 17, 1994

Court: Supreme Court of Oklahoma

Counsel for petitioner: Allen,Richard A.

Counsel for respondent: Johnston,Stanley

101994 Mr. Schweitzer states petr shld be as above-ltr coming

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1994	G	Petition for writ of certiorari filed.
2	Nov 16 1994		DISTRIBUTED. December 2, 1994 (Page 3)
3	Nov 21 1994	P	Response requested -- JPS. (Due December 21, 1994)
4	Nov 23 1994		Brief of respondents Oklahoma Tax Commission, et al. in opposition filed.
5	Dec 7 1994		REDISTRIBUTED. January 6, 1995 (Page 14)
6	Dec 13 1994	X	Reply brief of petitioners filed.
7	Jan 6 1995		Petition GRANTED. **********
8	Feb 2 1995		SET FOR ARGUMENT TUESDAY, APRIL 18, 1995. (3RD CASE).
9	Feb 21 1995		Brief amicus curiae of National Retail Federation filed.
10	Feb 21 1995		Brief amici curiae of Washington Legal Foundation, et al. filed.
11	Feb 21 1995		Joint appendix filed.
12	Feb 21 1995		Brief of petitioners National Private Truck Council, Inc., et al. filed.
13	Feb 21 1995		Brief amicus curiae of Direct Marketing Association, Inc. filed.
14	Feb 24 1995		CIRCULATED.
15	Mar 6 1995		Record filed.
		*	Original record proceedings Supreme Court of Oklahoma (BOX)
16	Mar 21 1995		Brief amici curiae of New Jersey, et al. filed.
20	Mar 21 1995		LODGING consisting of one copy of a single document entitled State Tax Appeal Systems, No. 144, Aug.1994, submitted by counsel for amici New Jersey, et al.
19	Mar 23 1995	X	Brief amici curiae of Boyertown Area School District, et al. filed.
17	Mar 24 1995	X	Brief of respondents OK Tax Commission, et al. filed.
18	Mar 24 1995	X	Brief amici curiae of National Conference of State Legislatures, et al. filed.
21	Apr 11 1995	X	Reply brief of petitioners filed.
23	Apr 18 1995		ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In The

Supreme Court Of The United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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QUESTION PRESENTED

Whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE

A. Proceedings Before this Court's Remand 3

B. This Court's Remand 7

C. The Decision Below 8

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS A RECURRING AND IMPORTANT ISSUE ON WHICH STATE SUPREME COURTS ARE SHARPLY DIVIDED 9

II. THE DECISION BELOW CONFLICTS WITH *DENNIS V.HIGGINS* AND OTHER DECISIONS OF THIS COURT REQUIRING STATE COURTS TO ENFORCE FEDERAL RIGHTS 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Pages
American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987)	3,6,7
American Trucking Ass'ns v. Secretary of Administration, 415 Mass. 337, 613 N.E.2d 95 (1993)	12
American Trucking Ass'ns v. Secretary of State, 595 A.2d 1014 (Me. 1991)	12
Backus v. Civilis, 236 Ga. 500, 224 S.E.2d 370 (Ga. 1976)	12
Bloomingdale's by Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1993); *cert. denied* ___ U.S. ___, 113 S.Ct. 3002 (1993)	12,13
Bung's Bar and Grille, Inc. v. Township of Florence, 206 N.J. Super., 432, 502 A.2d 1198 (1985)	12
Burrell v. Mississippi State Tax Commission, 536 So.2d 848 (Miss. 1988)	12
City of Riverside v. Rivera, 477 U.S. 561 (1986)	10
Complete Auto Transit, Inc. v. Brady, 430 U.S. 271 (1977)	5,6
Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.) *cert. denied*	6
Dennis v. Higgins, 498 U.S. 439 (1991)	passim
Dennis v. State, 234 Neb. 427, 451 N.W.2d 676 (1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991)	4
Howlett v. Rose, 496 U.S. 356 (1990)	9,14
Hutto v. Finney, 437 U.S. 678 (1978)	10

Kentucky v. Graham, 473 U.S. 159 (1985) 10

Maine v. Thiboutot, 448 U.S. 1 (1980) 10

Marx v. Truck Renting and Leasing Ass'n, Inc., 520 So.2d 1333 (Miss. 1987) 12

Murtagh v. County of Berks, 634 A.2d 179 ((Pa. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1497 (1994) 12,13

National Private Truck Council, Inc., et al. v. Oklahoma Tax Commission, et al., 501 U.S. 1247 (1991) 3

Neiman Marcus Group, Inc. v. Meehan, 1991 Conn. Super. LEXIS 2135 (1991) 12

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 11

Pechiney Corp. v. Crystal, 43 Conn. Supp. 91, 643 A.2d 319 (Conn. Super. 1994) 12,13,15

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 15

Private Truck Council of America et al. v. Oklahoma Tax Commission, 806 P.2d 598 (Okla. 1991) . . . . . passim

Private Truck Council v. Secretary of State, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986) 4

Private Truck Council v. State, 128 N.H. 466, 517 A.2d 1150 (1986) 4

Private Truck Council v. State, 221 N.J. Super. 89, 534 A.2d 13 (1987) *aff'd en banc*, 111 N.J. 214, 544 A.2d 33 (1988) 4

Radio Common Carriers of New York, Inc. v. State, 601 N.Y.S.2d 513 (Sup. Ct. 1993) 12

Raschke v. Blancher, 141 Ill. App.3d 813, 491 N.E. 1171, 96 Ill. Dec. 711 (Ill. App. 1986) 12

Riverton Produce Co. v. State, 871 P.2d 1213 (Colo. 1994) 12

Rowan Companies, Inc. v. State Tax Commission, 623 So.2d 159 (La. App. 1 Cir. 1993) 12

Smith v. Robinson, 468 U.S. 992 (1984) 10

Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (C.S. 1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) 12

State Dep't of Revenue v. Private Truck Council, 531 So.2d 367 (Fla. Dist. Ct. App. 1st Dist. 1988 4

State ex rel. Burk v. Oklahoma City, 522 P.2d 612 (Okla. 1973) 7

State v. Private Truck Council, 258 Ga. 531, 371 S.E.2d 378 (1988) 4

State v. Quill, 500 N.W.2d 196 (N.D. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 173 (1993) 8,11

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 10

Ziska v. Water Pollution Control Authority, 195 Conn. 682, 490 A.2d 509 (Conn. 1985) 11

Constitutional Provisions And Statutes

Commerce Clause of the United States Constitution, Article I, Section 8 . . . . . passim

Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution . . 5

28 U.S.C. § 1257(a) 2
28 U.S.C. § 1341 8,9,13,14,15
42 U.S.C. § 1983 . . . . . passim
42 U.S.C. § 1988 . . . . . passim
12 O.S. 1981 § 18(c) 7
47 O.S. 1986 Supp. § 1120(K) 3
68 O.S. 1982 Supp. § 607.1 3

Other

H.R. Rep. No. 94-1558 (1976) 11

No. _____

In The

Supreme Court Of The United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,[1]

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.[2]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma issued on July 19, 1994 (App. A, *infra*) is not yet reported. An earlier opinion of the Oklahoma Supreme Court (App. B), *infra*, which was vacated and remanded by this Court "for further consideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)," is reported at 806 F.2d 598 (Okla. 1991). The opinion of the district court of Oklahoma County (App. C, *infra*) is not re-

[1] National Private Truck Council, Inc. is a trade association and has no subsidiaries. The non-wholly owned subsidiaries of Westinghouse Electric Corporation are listed in App. H.

[2] Respondents are the Oklahoma Tax Commission and the following members of the Commission: Robert E. Anderson, Chairman, Robert L. Wadley, Vice Chairman, and Don Kilpatrick, Secretary-Member. The individual respondents are successors in office to other officials whom petitioners had sued in their official capacities for declaratory and injunctive relief.

ported. The decision of the district court of Oklahoma County denying petitioners' motion for a preliminary injunction or escrow is set forth in App. D and App. E, *infra*.

JURISDICTION

The judgment of the Supreme Court of Oklahoma (App. A, *infra*, 1a-23a) was entered on July 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

> The Congress shall have Power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of section[ ]. . . 1983 . . . of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

Pertinent provisions of Oklahoma's retaliatory tax statute, 47 O.S. 1986 Supp. § 1120(K) and 68 O.S. 1982 Supp. § 607.1, are set forth in App. F, *infra*.

STATEMENT OF THE CASE

In the decision under review, the Supreme Court of Oklahoma has, for the second time, held that petitioners, who successfully challenged a state truck tax as violating their rights under the Commerce Clause of the United States Constitution, are not entitled to federal remedies under 42 U.S.C. §§ 1983 and 1988 notwithstanding this Court's action in vacating and remanding the first decision denying such relief "for further consideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)." *National Private Truck Council, Inc., et al. v. Oklahoma Tax Commission, et al.*, 501 U.S. 1247 (1991).

A. Proceedings Before this Court's Remand

This case has had a long and tortuous history. On December 17, 1984, petitioners filed a class action suit in Oklahoma state court challenging the constitutionality of certain "retaliatory taxes" that the State of Oklahoma imposed on motor carriers who operated trucks in Oklahoma that were registered in certain other states. These taxes were not imposed on trucks registered in Oklahoma. (App. 27a-28a, 59a.) The purpose of these taxes was to retaliate against states imposing so-called "third structure taxes,"[3] which certain states have imposed on

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[3] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first structure" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Oklahoma and six other states to enact retaliatory taxes,

all motor carriers operating in those states, including Oklahoma registered carriers, and to which the Oklahoma legislature objected. These statutes carried out this purpose by authorizing respondents to impose taxes on carriers registered in those states that operate in Oklahoma which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third-structure tax states, Oklahoma's legislature hoped to pressure the legislatures of those states to repeal their third-structure taxes or to exempt Oklahoma-based carriers from them.

Respondents implemented these statutes in 1983 by imposing retaliatory taxes on carriers with trucks operating in Oklahoma that were registered in 25 states.[4]

Petitioners are the National Private Truck Council, Inc. ("NPTC"), Westinghouse Electric Corporation, and Roy Griffis. NPTC is the national trade association of "private carriers" — companies that own and operate their own truck fleets primarily in furtherance of their non-transportation businesses. NPTC is the successor to the Private Truck Council of America, Inc., which was the original lead plaintiff in this suit and in six other suits which successfully challenged retaliatory taxes imposed by other states.[5] Westinghouse Electric Corporation is

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and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

[4] These were Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Nevada, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[5] *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council v. State*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council v. State*, 221 N.J. Super. 89, 534 A.2d 13 (1987) *aff'd en banc*, 111 N.J. 214, 544 A.2d 33 (1988); *State v. Private Truck Council*, 258 Ga. 531, 371 S.E.2d 378 (1988); *State Dep't of Revenue v. Private Truck Council*, 531 So.2d 367 (Fla. Dist. Ct. App. 1st Dist. 1988); *Dennis v. State*, 234 Neb. 427, 451 N.W. 2d 676 (1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991).

the successor to the rights of its former subsidiary Circle W Transportation, which operated 15 Pennsylvania registered trucks in Oklahoma and therefore paid $1,080 in retaliatory taxes to Oklahoma in 1984. Roy Griffis is an unincorporated "owner operator" residing in Bearden, Arkansas. Griffis paid $185 in retaliatory taxes to Oklahoma in 1984. (App. 25a.)

Petitioners' complaint alleged that Oklahoma's retaliatory tax statutes discriminated on their face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983. The complaint sought declaratory and injunctive relief, refunds of taxes paid and attorneys' fees under state law and 42 U.S.C. § 1988. Upon filing the complaint, petitioners moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.

Although the trial court acknowledged that the taxes were probably unconstitutional, it denied petitioners' motion for a preliminary injunction against their collection, or alternatively, for an order requiring them to be held in escrow because it felt that the merits of the action could be promptly decided. (App. 54a-55a, 58a.) Two years later, another judge of the same court finally ruled on petitioners' summary judgment motion, denying it and upholding the constitutionality of the taxes. (App. 48a-53a.)

Petitioners appealed to the Oklahoma Supreme Court. More than three years later, on June 28, 1990, that court issued a decision reversing the trial court's decision upholding the taxes. (App. B.) The court held, "The questioned statutes are plainly discriminatory" and thus violate the Commerce Clause under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). (*Id.* at 34a-35a.) The court stated:

"Obviously ... Oklahoma's retaliatory taxes do not pass the third and fourth prongs [of the *Complete Auto* test]." (*Id.* at 35a.)

With respect to a remedy, the court held that petitioners are entitled under the pertinent Oklahoma tax refund statute to recover refunds of unconstitutional taxes on a class-wide basis. (*Id.* at 39a.) However, the court ruled that its holding would operate "quasi-prospectively from the date of the . . . decision [of this Court in *American Trucking Ass'ns v. Scheiner*,]" — *i.e.*, from June 23, 1987.[6] As corrected by two subsequent orders, the court's final opinion remanded with directions to respondents to refund taxes paid with respect to tax periods occurring after June 23, 1987.[7]

The Oklahoma Supreme Court also briefly addressed and rejected petitioners' claim under 42 U.S.C. § 1983 and their associated claim for attorneys' fees under 42 U.S.C. § 1988. It did so on the basis of *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.) *cert. denied*, 469 U.S. 834 (1984) and

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[6] The court did not explain how the decision in *Scheiner*, which concerned the constitutionality of facially neutral taxes, was related to the constitutionality of facially discriminatory taxes like those at issue in this case, but it concluded that denying refunds of taxes paid before *Scheiner* was warranted because of the "significant financial hardship upon the State in exercising its governmental functions" if full retroactive effect were given to its decision and because of a supposed "presumption of prospective application of state court decisions invalidating tax statutes." (*Id.* at 45a.)

[7] The court's initial decision, dated June 28, 1990, directed respondents to refund taxes "collected after June 23, 1990." On respondents' petition for rehearing, the Court issued a "Corrected Order" which amended the June 28, 1990 opinion to require refunds of all taxes collected "for the tax year 1987" and thereafter. On a petition for further rehearing filed jointly by respondents and petitioners, the court issued a further "Order of Clarification" which directed respondents to refund taxes paid "for the tax periods or portions of tax periods occurring after June 23, 1987."

other decisions (App. 46a), all of which this Court overruled in *Dennis v. Higgins*.[8]

B. This Court's Remand

Petitioners filed a petition for a writ of certiorari to review two aspects of the Oklahoma Supreme Court's decision: its denial of refunds of taxes paid with respect to the period before the *Scheiner* decision and its denial of petitioners' claims under 42 U.S.C. §§ 1983 and 1988. Petitioners pointed out that the denial of their claims under §§ 1983 and 1988 conflicted directly with this Court's decision in *Dennis v. Higgins*. In *Dennis*, which involved the challenge by NPTC and others to Nebraska's retaliatory truck tax on the same Commerce Clause ground asserted in this case, the Court held that the taxpayer's Commerce Clause claims were cognizable under § 1983. The Court stated that § 1983 "provides a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 498 U.S. at 445. With respect specifically to the challenge to Nebraska's truck taxes, the Court held: "We conclude that the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983." *Id.* at 451.

On July 31, 1991 this Court issued an order in which it summarily vacated the judgment of the Oklahoma Supreme Court and remanded the case to that court "for further reconsideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)." 501 U.S. 1247.

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[8] Petitioners had also argued to the trial court and the Oklahoma Supreme Court that they were entitled to an award of attorneys' fees from the fund of refunds recovered for the class under the common fund doctrine, which is well established under Oklahoma law, as it is in other states and in federal law. *State ex rel. Burk v. Oklahoma City*, 522 P.2d 612 (Okla. 1973). The Oklahoma Supreme Court in its decision did not address petitioners' claim for common fund fees, but instead stated that petitioners were not entitled to fees under a repealed state fee shifting statute, 12 O.S. 1981 § 18(c) — a contention that petitioners had never argued. (App. 46a).

C. The Decision Below

After several unsuccessful attempts to resolve outstanding issues with respondents, petitioners on July 20, 1992 filed a motion with the Oklahoma Supreme Court to remand the case to permit the trial court to establish a plan of distribution of tax refunds and accrued interest and to determine petitioners' attorneys' fees and litigation expenses. Respondents filed no opposition or other response to that motion.

On February 24, 1994 the Oklahoma Supreme Court *sua sponte* issued an order directing the parties to file briefs addressing various issues related to petitioners' entitlement to attorneys' fees. (App. G, *infra.*) After receipt of briefs from the parties, the court issued a decision holding that "plaintiffs are not entitled to relief under §§ 1983 and 1988." (App. 6a.)

The court below concluded that "principles of comity and federalism" supported its view that petitioners are not "entitled to assert federally created remedies under §§ 1983 and 1988 in this state court action." (App. 6a.) The court reasoned that the policies of the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining state taxes where "a plain, speedy and efficient remedy may be had in the courts of such State," authorize state courts to refuse to provide federal remedies established by §§ 1983 and 1988 to litigants challenging state taxes in state courts. (App. 6a-9a.) The court also relied on a decision of the North Dakota Supreme Court in *State v. Quill*, 500 N.W.2d 196 (N.D. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 173 (1993) to the same effect.

The court also asserted that its decision was not contrary to this Court's decision in *Dennis v. Higgins*, because, it said, this Court in *Dennis* had not addressed the effect of the Tax Injunction Act on the availability of remedies under §§ 1983 and 1988 in state tax cases (although it noted that the dissenting opinion in *Dennis* had cited the Tax Injunction Act). (App. 7a.)

For similar reasons the court rejected petitioners' reliance on *Howlett v. Rose*, 496 U.S. 356 (1990). (App. 8a.)

Accordingly, the court reinstated its earlier judgment without change. (App. 11a.)[9]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS A RECURRING AND IMPORTANT ISSUE ON WHICH STATE SUPREME COURTS ARE SHARPLY DIVIDED

In the decision below the Oklahoma Supreme Court held that state courts need not accord litigants remedies established by federal statutes in cases where federal courts lack jurisdiction to provide such remedies. That decision presents very fundamental and far reaching questions regarding the obligations of state courts to enforce federal law under our constitutional system.

In the context of this case — whether state courts must enforce rights and remedies under 42 U.S.C. §§ 1983 and 1988 in cases challenging state taxes on federal grounds — the question is an extraordinarily important and recurring one. As this Court's reports alone reflect, cases challenging state taxes on federal grounds are legion, and claims for relief under §§ 1983 and 1988 may be presented in every such case. Inasmuch as federal courts are precluded by the Tax Injunction Act, 28 U.S.C. § 1341, from providing injunctive or declaratory relief from state taxes that contravene federal constitutional or statutory requirements "where a plain, speedy and efficient remedy may be had in the courts of such state," the effect of the decision

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[9] The court also held that petitioners' claim of entitlement to attorneys' fees under the state law common fund doctrine was barred by its earlier opinion and the law of the case doctrine (App. 10-11a), even though its earlier opinion had never addressed petitioners' entitlement to fees and expenses under the common fund doctrine.

below would be to nullify, in all such cases, the remedies that Congress established in §§ 1983 and 1988, including, perhaps most significantly, the recovery of attorneys' fees under § 1988.

Such a result would take away the ability of many persons effectively to enforce their federal rights under the Commerce Clause or other constitutional or statutory provisions when they are violated by state taxes. When Congress enacted § 1988 in 1976, it recognized that the ability of plaintiffs to recover litigation costs and attorneys' fees is often essential to the effective protection of their constitutional rights. In *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980), this Court noted that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983." (citation omitted). *See also Smith v. Robinson*, 468 U.S. 992, 1006 (1984).[10]

Furthermore, Congress enacted § 1988 in recognition of the fact that parties who bring suit under § 1983 and prevail are typically seeking to redress not only their own injuries but also to vindicate important civil and constitutional rights of many other people and the public at large. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). As the House Report accompanying § 1988 noted, a person who obtains injunctive relief under § 1983 " does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered

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[10] This Court's decisions make clear that plaintiffs who would be entitled to relief under § 1983 are also entitled to recover their attorneys' fees unless there are special circumstances that would make such a recovery unjust. *Smith v. Robinson*, 468 U.S. at 1006. They also establish that plaintiffs may bring actions under § 1983 for injunctive and declaratory relief against state officials acting in their official capacities (*Will v. Michigan Department of State Police*, 491 U.S. 58, 71, n. 10 (1989)) and that the obligation of the states or agencies whom those officials represent to pay attorneys' fees is not subject to defenses of sovereign immunity or good faith execution of the challenged state law or practice. *Hutto v. Finney*, 437 U.S. 678 (1978); *Kentucky v. Graham*, 473 U.S. 159, 164-167 (1985).

of the highest importance." H.R. Rep. No. 94-1558, p. 2 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Section 1988 is no less important in vindicating the public and national interests in the free flow of interstate commerce, and the policies underlying § 1988 are fully applicable to Commerce Clause tax cases like this one. In many cases, including this one, a state tax that violates the Commerce Clause or other federal constitutional or statutory strictures will impose a cost on persons and companies that is substantially less, in the case of even the largest companies, than the expense of bringing a lawsuit to challenge it. If, as the court below held in this case, attorneys' fees are not recoverable under state law, the prospect of recovering litigation and attorneys' fees under § 1988 may be the only practical means of bringing suit to invalidate and enjoin the tax.[11]

Accordingly, whether the Oklahoma Supreme Court correctly held that the remedies Congress established in §§ 1983 and 1988 are not available in cases challenging state taxes would be an important question warranting this Court's review even if there were no conflict on that issue among the courts of the states. State courts, however, are sharply divided on that issue.

In the decision below, the court cited and relied on decisions of the North Dakota Supreme Court in *State v. Quill*, *supra*, the Connecticut Supreme Court in *Ziska v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985),

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[11] In some case, of course, associations of taxpayers or other victims of unconstitutional state action may fund litigation challenging unconstitutional state taxes. In other cases, there may not be associations with sufficient resources to do so. In the case of NPTC's litigation against retaliatory taxes, NPTC and its predecessor were able to undertake that effort only because its attorneys were willing to do so on a contingent fee basis. Even where associations or individuals fund litigation themselves, moreover, Congress enacted § 1988 in order to impose those expenses on the party whose unconstitutional acts gave rise to the expenses rather than on the victims of those acts or their representatives.

the Georgia Supreme Court in *Backus v. Civilis*, 236 Ga. 500, 224 S.E.2d 370 (1976), and an Illinois appellate court in *Raschke v. Blancher*, 141 Ill. App.3d 813, 96 Ill. Dec. 711, 491 N.E. 1171, (Ill. App. 1986). (App. 6a-9a.). *See also Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985).

As the court below also acknowledged, a number of other state court decisions have upheld the rights of plaintiffs to challenge state taxing schemes under § 1983 in state court and to obtain relief under § 1988. These have included decisions of the Pennsylvania Supreme Court in *Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1497 (1994); the Supreme Judicial Court of Massachusetts in *American Trucking Ass'ns v. Secretary of Admin.*, 415 Mass. 337, 613 N.E.2d 95 (1993); the Supreme Court of Tennessee in *Bloomingdale's by Mail v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992); *cert. denied* __ U.S. __ , 113 S.Ct. 3002 (1993); the Supreme Judicial Court of Maine in *American Trucking Ass'ns v. Secretary of State*, 595 A.2d 1014 (Me. 1991); the Supreme Court of Mississippi in *Burrell v. Mississippi State Tax Comm'n*, 536 So.2d 848, 863-64 (Miss. 1988); *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So.2d 1333 (Miss. 1987); and the Supreme Court of Colorado in *Riverton Produce Co. v. State*, 871 P.2d 1213 (Colo. 1994). *See also Pechiney Corp. v. Crystal*, 43 Conn. Supp. 91, 643 A.2d 319 (Conn. Super. 1994); *Rowan Companies, Inc. v. State Tax Comm'n*, 623 So.2d 159 (La. Ct. App. 1st Cir. 1993); *Radio Common Carriers of New York, Inc. v. State*, 601 N.Y.S.2d 513 (Sup. Ct. 1993); *Neiman Marcus Group, Inc. v. Meehan*, 1991 Conn. Super. LEXIS 2135 (1991); and *Bung's Bar and Grille, Inc. v. Township Council of Florence*, 206 N.J. Super., 432, 457-62, 502 A.2d 1198, 1213-16 (1985).

The conflict is clear and direct. In *Bloomingdale's By Mail*, for example, the Supreme Court of Tennessee held that

Tennessee's use tax violated the Commerce Clause to the extent it applied to out-of-state mail order companies, and it held that the plaintiffs were entitled to attorneys' fees under 42 U.S.C. § 1988. After reviewing this Court's decisions, the court concluded that "a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights. . . . If the party enforcing such rights is successful, that party is entitled to receive an award of attorney's fees under 42 U.S.C. § 1988 . . . ." 848 S.W.2d at 56.

Similarly, in *Murtagh v. County of Berks*, a case challenging tax assessment procedures under the Fourteenth Amendment, the Supreme Court of Pennsylvania squarely rejected the argument, adopted by the court below, that prohibitions imposed on federal courts by the Tax Injunction Act and principles of comity against enjoining state taxes justified *state* courts in refusing to enforce federal remedies. The court stated:

> [T]he principle of comity that causes a federal court to refrain from exercising jurisdiction over section 1983 tax assessment cases has no relevance to a class action challenging, in state court, the constitutionality of a system of property tax assessment.

634 A.2d at 185. *See also, Pechiney Corp. v. Crystal*, 643 A.2d at 321. The other cited decisions reflect the same conclusions, implicitly or explicitly.

This conflict among the state courts, including many of the highest state courts, warrants this Court's review. The issue has arisen in many cases in recent years. It is likely to recur in almost every case challenging state taxes under the Commerce Clause or other federal constitutional and statutory provisions, and may also arise with respect to other state court actions seeking to enforce federal rights to which the rationale of the court below could be extended. This case presents the issue squarely and is an appropriate case in which to consider and resolve the issue.

II. THE DECISION BELOW CONFLICTS WITH *DENNIS V. HIGGINS* AND OTHER DECISIONS OF THIS COURT REQUIRING STATE COURTS TO ENFORCE FEDERAL RIGHTS

Contrary to the opinion of the Oklahoma Supreme Court, petitioners submit that its decision conflicts directly with this Court's decision in *Dennis v. Higgins*. In *Dennis*, as noted, the Court held that "the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983." 498 U.S. at 451. In this case, the Supreme Court of Oklahoma held that petitioners' identical Commerce Clause claim could not be brought under § 1983.[12] That holding is as erroneous as was the Nebraska Supreme Court's in *Dennis*.[13]

The decision below is also contrary to *Howlett v. Rose*, 496 U.S. 356 (1990), in which this Court held that state courts could not refuse to entertain actions under § 1983 on the grounds of sovereign immunity. The Court reaffirmed the basic principle that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." 496 U.S. at 367. The Court therefore held that Florida courts could not

[12] By holding that "plaintiffs are [not] entitled to assert federally created remedies under §§ 1983 and 1988 in this state court action" and that "plaintiffs are not entitled to relief under §§ 1983 and 1988" despite the undisputed violation of their Commerce Clause rights by the State (App. 6a), there can be no question but that the court below held that petitioners were not entitled to bring their Commerce Clause challenge under § 1983.

[13] Nor is there any basis for the Oklahoma Supreme Court's suggestion that this Court did not consider "the effect of the Tax Injunction Act on the issue of whether the state court should grant § 1983 relief, although a federal court could not do so." (App. 7a.) Since, as that court itself noted, Justice Kennedy's dissent in *Dennis* specifically expressed concern about the effect of the Court's decision in view of the policies underlying the Tax Injunction Act, there is no basis for supposing that the majority of the Court did not consider it.

refuse to enforce claims under § 1983 unless they did so on the basis of neutral rules of court administration, such as *forum non conveniens* rules, that are applied equally to federal and state law causes of action. Because Florida courts entertain state-law actions against state defendants that are similar to Howlett's federal claim based on § 1983, the Court held that they could not deny his § 1983 claim.

Those principles apply fully in this case. Oklahoma courts entertain actions for injunctive and declaratory relief against unconstitutional state taxes, and in fact did so in this case. They cannot therefore deny claims for such relief based on certain federal statutes — namely, §§ 1983 and 1988.

Furthermore, as the Supreme Court of Pennsylvania and other courts have held, principles of comity and the Tax Injunction Act provide no support for the decision below. Those principles and that Act only limit the authority of *federal* courts to interfere with state tax processes. As Judge Blue of the Connecticut Superior Court recently stated:

> These concerns of comity, however, in no way foreclose *state* courts from hearing § 1983 actions in conjunction with state tax appeals. Neither the letter nor spirit of [28 U.S.C.] § 1341 are violated by the existence of such state court jurisdiction. This jurisdiction, in fact, fully implements the policies of both § 1983 (i.e. the vindication of civil rights) and § 1341 (i.e. the noninterference of federal courts in state tax matters) in a way that federal jurisdiction does not.

Pechiney Corp. v. Crystal, 643 A.2d at 321.[14] Indeed, because of the limitations the Eleventh Amendment and the Tax Injunction Act impose on federal courts in state tax matters, this Court observed in *Pennhurst State School and Hospital v. Halderman*,

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[14] Judge Blue also correctly observed that because federal courts are courts of limited jurisdiction and state courts are courts of general jurisdiction, "it is not at all anomalous for state courts to have jurisdiction over matters that federal courts cannot lawfully adjudicate." 643 A.2d at 321.

465 U.S. 89, 122 (1984) that "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . must be brought in state court."

The decision below cannot be reconciled with the foregoing decisions.

CONCLUSION

The petition for the writ of certiorari to the Supreme Court of Oklahoma should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,
CIRCLE W TRANSPORTATION, INC.,
and ROY E. GRIFFIS,
on behalf of themselves and all others similarly situated,
Appellants,

v.

OKLAHOMA TAX COMMISSION, ET AL.,
Appellees,

and

ASSOCIATED MOTOR CARRIERS
OF OKLAHOMA, INC.,
Intervenor.

ON REMAND FROM THE UNITED STATES SUPREME COURT

The United States Supreme Court vacated the judgment called for in our opinion in *Private Truck Council of America, Inc. et. al. v. Oklahoma Tax Commission, et. al.*, 806 P.2d 598 (Okla. 1991), and remanded the matter to this Court for further consideration in light of *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), where the court held, for the first time, that suits for unconstitutional violations of the Interstate Commerce Clause created a right of action under 42 U.S.C. § 1983. Although the right of action is created, we find that in Oklahoma an adequate state remedy exists for redress, as the trial court held. We hold that the trial court correctly dismissed plaintiffs' § 1983 claim. A federal court would have been

prohibited, under The Tax Injunction Act, 28 U.S.C. § 1341, from entertaining such a claim because "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." To allow § 1983 remedies in the courts of this state would give plaintiffs relief to which they would not have been entitled in federal court. Thus, under the principles of comity, we hold that state courts in Oklahoma may not enforce federally created rights, which federal law prohibits federal courts from enforcing.

JUDGMENT REINSTATED

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PER CURIUM,

This case is before us on remand from the United States Supreme Court. The judgment was vacated and the cause remanded for our consideration in light of *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). We held in our original opinion in this appeal, *Private Truck Council, Inc. v. Oklahoma Tax Commission*, 806 P.2d 598 (Okla. 1991), that

68 O.S.Supp.1982 § 607.1 and 47 O.S.Supp.1986 § 1120(K) were unconstitutional because they violated the fundamental requirement of nondiscrimination against interstate commerce.[1] Based upon that holding, we found it unnecessary to address plaintiffs' constitutional challenge of the tax statutes under the Privileges and Immunities Clause. We affirmed the trial court's denial of plaintiffs' federal claim for refund under 42 U.S.C. § 1983 because Oklahoma has an adequate state remedy affording the requested relief. We allowed a refund to plaintiffs based upon the refund procedures in 68 O.S. 1981 § 226.1, from the payment of the 1987 taxes, based upon *American Trucking Ass'ns., Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), and *American Trucking Ass 'ns., Inc. v. Smith,* 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990).

The trial court denied plaintiffs' motion for summary judgment, finding that the two statutes did not violate the Interstate Commerce Clause, and dismissed Count III of plaintiffs' petition, which sought a refund under 42 U.S.C. § 1983, for failure to state a claim. Plaintiffs' Count III asserted that the defendants violated the Interstate Commerce Clause and the Privileges and Immunities clauses of the United States Constitution, as set out in Counts I and II of their petition, under color of state law, and threatened to deprive plaintiffs of rights guaranteed by the United States Constitution. Thus, plaintiffs alleged that defendants were liable to plaintiffs under 42 U.S.C. § 1983. Plaintiffs prayed for: 1) a declaratory judgment that the two statutes were null and void because they violated the United States Constitution and other laws, 2) a permanent injunction enjoining the Oklahoma Tax Commission from assessing or collecting the

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[1] Plaintiffs, who are appellants here, filed suit against defendants for a refund of taxes imposed under 68 O.S.Supp. 1983 § 607.1 and 47 O.S.Supp. 1983 § 22.5j(K). These statutes imposed fees and taxes on nonresident motor carriers operating in Oklahoma to the same extent carriers resident in Oklahoma were taxed by the nonresident motor carriers' states of residence. Plaintiffs claimed that these statutes were unconstitutional.

retaliatory taxes and fees on nonresident motor carries under the above-referenced statutes, 3) a refund of all retaliatory taxes and fees collected by the Oklahoma Tax Commission pursuant to 68 O.S. 1981 § 607.1 and 47 O.S. Supp. 1986 § 1120(K), plus interest, and 4) attorneys' fees under 12 O.S. 1981 § 18(C) and 42 U.S.C. § 1988, and costs.

The trial court dismissed plaintiffs' claim for refund under 42 U.S.C. § 1983, relying on *Consolidated Freightways of Delaware v. Kassel,* 730 F.2d 1139 (8th Cir. 1984), in which the Eighth Circuit had held that violations of the Interstate Commerce Clause were not a basis for bringing a civil rights action under 42 U.S.C. § 1983. We affirmed the trial court's denial of plaintiffs' claim for refund under § 1983, because Oklahoma has an adequate state remedy affording the relief plaintiffs requested. We reversed the trial court's summary judgment to defendants on Counts I and II of plaintiffs' petition, finding that the two statutes violated the Interstate Commerce Clause. We denied the plaintiffs claim for attorneys' fees, however, because plaintiffs had no civil rights claim under § 1983 and, accordingly, no right to attorneys' fees under 42 U.S.C. § 1988. We also denied plaintiffs' claim for attorneys' fees under state law on the ground that the statute upon which plaintiffs relied, 12 O.S. 1981 § 18(C) was repealed before plaintiffs filed their action.

After our decision in the case at bar, the United States Supreme Court handed down the case of *Dennis v. Higgins,* 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). In *Dennis,* the United States Supreme Court held, contrary to our earlier opinion in this matter, that claims for violations of the Interstate Commerce Clause *may be* brought under § 1983. In *Dennis* the trial court held that the Nebraska taxing statutes at issue violated the Interstate Commerce Clause, for essentially the same reasons that we held in our first opinion in the case at bar. The *Dennis* trial court permanently enjoined the Nebraska Depart-

ment of Motor Vehicles from assessing, levying or collecting the taxes and fees. The Nebraska trial court awarded the plaintiffs attorneys' fees and expenses under the "common fund" doctrine, but denied the § 1983 claims under *Kassel*. Both sides appealed, although the unconstitutionality of the taxing statutes was not appealed. The Supreme Court of Nebraska affirmed the dismissal of plaintiffs' § 1983 claim, but reversed the allowance of attorneys' fees under the common fund doctrine. The Nebraska Supreme Court held, despite § 1983's broad language, that there was no cause of action under § 1983 for violation of the Commerce Clause. As in *Dennis*, the trial court in the case at bar ruled that plaintiffs failed to state a claim under § 1983.

In *Dennis v. Higgins*, Id., the United States Supreme Court decided that the Commerce Clause creates rights that can be asserted under 42 U.S.C. § 1983 because the Commerce Clause confers rights, privileges or immunities within the meaning of § 1983. Thus, suits for violation of the Commerce Clause may be brought under § 1983 to obtain injunctive and declaratory relief from state action that violates the Commerce Clause. We directed the parties to file supplemental briefs addressing the affect of *Dennis* on plaintiffs' claims.

Here, plaintiffs sought declaratory and injunctive relief, a refund of taxes paid, and an attorneys' fee, under both state law, and § 1983. In our first opinion we held the two taxing statutes unconstitutional and granted plaintiffs a partial refund. It is clear to us that the United States Supreme Court vacated our opinion because of our reliance on *Kassel*, which the Supreme Court repudiated in *Dennis*. *Dennis*, however, did not address the critical issue of whether a state court, under the principles of comity, should decline to grant relief under § 1983, a federal law, when a federal court would have been prohibited from granting such relief under The Tax Injunction Act, 28 U.S.C. § 1341.

I.

We now reconsider whether plaintiffs are entitled to assert federally created remedies under §§ 1983 and 1988 in this state court action. We hold, under the principles of comity and federalism, that plaintiffs are not entitled to relief under §§ 1983 and 1988.

We have not previously addressed this issue, but the Supreme Court of North Dakota recently considered it. *State v. Quill, 500* N.W.2d 196 (N.D. 1993) Cert. Denied ___ U.S. ___, 114 S.Ct. 173 (1993), was virtually identical to the case at bar. There, as here, 1) the matter came before the court following reversal by the United States Supreme Court of an earlier opinion, which had erroneously held that a state tax act did not violate the Commerce Clause of the U.S. Constitution; 2) the taxpayers sought an attorneys' fee under § 1983 and § 1988; and 3) the parties did not dispute that state statutes provided the parties full relief from the unconstitutionality of the involved tax acts. The *Quill* court denied an attorneys' fee to Quill, on the ground of comity and federalism, because a federal court would have been prohibited from granting such relief under the Tax Injunction Act, 28 U.S.C. § 1341.[2] The *Quill* court concluded that, while § 1341 did not expressly prohibit state courts from granting federally created relief, state courts should decline to exercise such jurisdiction. Relying on its earlier opinion in *Linderkamp v. Bismark School District No. 1,* 397 N.W.2d 76 (N.D. 1986), the *Quill* court held that the taxpayer could not obtain § 1983 relief in the state court action.

We find the language of the North Dakota Supreme Court's *Linderkamp* opinion convincing:

> Recognition that the proscriptions of the Tax Injunction Act are based at least in part upon deference to

[2] § 1341 directs:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

> state remedial schemes leads to the conclusion that a state court §1983 action, *which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a §1983 action brought in federal court....* [Emphasis added.] *Linderkamp,* 387 N.W.2d at 80.

Plaintiffs' contentions here, are virtually identical to those of the plaintiff in *Quill.* Plaintiffs contend that the *Quill-Linderkamp* rationale is contrary to the holdings of the U.S. Supreme Court in *Dennis,* and *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). We disagree. Neither *Dennis,* nor *Howlett,* addressed the issue of whether a state court should decline to impose federal remedies when state remedies are adequate and a federal court would, therefore, be prohibited from enforcing such remedies under the Tax Injunction Act.[3]

The *Dennis* court's majority did not address whether state remedies were adequate, or the effect of the Tax Injunction Act on the issue of whether the state court should grant § 1983 relief, although a federal court could not do so. Justice Kennedy's dissent in *Dennis,* in which the Chief Justice concurred, however, expressed concern that ignoring the Tax Injunction Act risks "destruction of state fiscal integrity in a manner which may require congressional correction." *Dennis,* 498 U.S. at 464-65, 111 S.Ct. at 880.

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[3] Because of the proscriptions of The Tax Injunction Act, the adequacy of the state remedy in this action complaining of a tax statute, must be measured by what is required by 14th Amendment due process, not by the remedies made available by the Congress in § 1983 actions. State law satisfied due process requirements by providing for a refund of the taxes the state wrongly exacted, interest on those amounts, and an injunction prohibiting the collection of such taxes in the future. No case we have found requires an attorneys' fees to be granted to satisfy due process requirements. Indeed, the Congress did not provide for an attorneys' fee in § 1983 actions until the 1976 amendment to § 1988 so provided. Pub.L. 94-559.

In *Howlett,* the U.S. Supreme Court held that the Supremacy Clause of the Constitution is "the supreme law of the land" and requires state courts to enforce federally created remedies "according to their regular modes of procedure." *Howlett,* 496 U.S. at 367, 110 S.Ct. at 2438. As noted in *Quill,* however, *Howlett* makes clear that "the Supremacy Clause precludes state courts from applying state procedural rules *that would necessarily produce a different result than if the case had been brought in federal court."* [Emphasis added.] *Quill,* 500 N.W.2d at 199. Our holding today, applying the *Quill-Linderkamp* rationale, is perfectly consistent with the federal interest, and this State's interest, in having state courts apply the law no differently than would federal courts. Clearly, state courts are not required to grant attorneys' fees under §§ 1983 and 1988, when federal courts would be prohibited from doing so.

Plaintiffs argue, correctly, that The Tax Injunction Act applies only to federal courts. Plaintiffs, however, fail to recognize that one of the principles of comity is that potential differences in remedies available in state court and federal court should be avoided. The existence of such differences encourages forum shopping. As the U.S. Supreme Court observed in *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), "A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity." To order an attorneys' fee under § 1988 here, would pervert this wise policy of intrastate uniformity between state and federal courts.

In addition to North Dakota, at least three other states have declined to impose § 1983 remedies in cases in which a federal court could not have also granted such remedies: *Ziska v. Water Pollution Control Authority,* 195 Conn. 682, 490 A.2d 509 (Conn. 1985); *Backus v. Chilivis,* 236 Ga. 500, 224 S.E.2d 370 (Ga. 1976); *Raschke v. Blancher,* 141 Ill.App.3d 813, 491

N.E.2d 1171, 96 Ill.Dec. 711 (Ill.App. 1986) appeal denied (1986). Although there is authority contrary to the views expressed in the cases from these four states, we believe that these cases represent the better view.[4] We have found no case, which granted § 1983 relief in these circumstances, which satisfactorily explains to us why a state court should do so.

An important distinction exists between a state court's *jurisdiction*, and the principles of *comity*. In *State Tax Commission v. Fondren*, 387 So.2d 712, 723 (Miss. 1981), the Mississippi Supreme Court held that a state court hearing a § 1983 claim lacked *jurisdiction* to grant more relief than a federal court could have done. The Connecticut Supreme Court, in *Ziska*, rejected the *Fondren* court's analysis, saying, "we believe that the better view is that § 1341 [The Tax Injunction Act] does not deprive state courts of all jurisdiction to hear § 1983 challenges to state taxes. *Section 1341 is rooted in principles of federalism. It reflects the policy that federal courts should not interfere with the collection of state taxes.*" [Emphasis added.] 490 A.2d at 513. The *Ziska* court declined to hear plaintiffs § 1983 claims under the principles of comity and federalism.

The Mississippi Supreme Court later observed, in *Burrell v. Mississippi, State Tax Commission*, 536 So.2d 848, 863-64, that it had implicitly overruled *Fondren* in *Marx v. Truck Renting and Leasing Ass'n., Inc.*, 520 So.2d 1333, 1346 (Miss.

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[4] A few state courts have applied § 1983 remedies, despite the adequacy of state law remedies, and the fact that a federal court would have been prohibited from granting such relief because of The Tax Injunction Act. See, for example, *Harlan Sprague Dawley, Inc. v. Indiana Dept. of State Revenue*, 583 N E.2d 214 (Ind.Tax 1991) and *Murtaugh v. County of Berks*, 634 A.2d 179, cert. denied _ U.S. _, 114 S.Ct. 1497, 128 L.Ed.2d 71 (1994). The *Dawley* and *Murtaugh* courts justified allowing the plaintiffs to recover § 1983 remedies, "because there is no risk of federal court interference." Neither court discussed the likelihood of forum shopping created by allowing the parties relief in state court to which they would not have been entitled in federal court.

1987). In both opinions, the *Mississippi* court, as it had in *Fondren,* limited its discussions to the *jurisdiction* of state courts to hear § 1983 claims. Neither *Fondren,* nor the two later opinion discussed the comity and federalism issues.

Plaintiffs rely on an unpublished opinion of the Connecticut intermediate appellate court, *Neiman Marcus Group, Inc. v. Meehan,* 1991 WL 194298, LEXIS 2135 (Conn.Super. 1991), which concluded that *Ziska* could not be relied upon as authority to support the state's claim that Connecticut courts lacked *jurisdiction* to consider § 1983 claims. As in the later Mississippi opinions, the comity and federalism issues were not considered by the *Neiman Marcus* court. Our analysis convinces us that if the Connecticut Supreme Court were again presented with the issues of comity and federalism, which it decided in *Ziska,* it would again conclude, as the North Dakota court did in *Quill* and *Linderkamp,* that the state court should not give relief that a federal court sitting in the same state could not give.[5]

We hold that the trial court reached the right result in declining to grant an attorneys' fee under §§ 1983 and 1988.

II.

Plaintiffs claim that they are entitled to an attorneys' fee under state law. They contend that they should be granted a fee from the amount of the recovery under the "common fund doctrine." Plaintiffs made identical claims in the first appeal of this case. The facts concerning this issue are unchanged from the first appeal. Consequently, our conclusion in the first appeal

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[5] The *Neiman Marcus* court relied on the U.S. Supreme Court's opinions in *Dennis* and *Felder* to support its position that *Ziska* was no longer good law. The comity and federalism issues were not before the U.S. Supreme Court in *Dennis,* and *Felder* points out that a policy allowing the choice of a federal or state forum, within the same state, to change the result of a § 1983 case, "is obviously inconsistent with this federal interest in intrastate uniformity." This desire for intrastate consistency is the basis for our opinion that we should not allow § 1983 remedies here.

that plaintiffs are not entitled to an attorneys' fees under state law is the law of the case. "As the 'law of the case,' the original appeal controls all subsequent proceedings, and will not be reversed on a second appeal, [unless not to do so would] result in a gross or manifest injustice" *McDonald v. Humphries*, 810 P.2d 1262, 1266-67 (Okla. 1990); *Handy v. City of Lawton*, 835 P.2d 870, 873 (Okla. 1992). We find no error in our prior opinion on this issue. We are satisfied that our refusal to revisit the issue will not result in a "gross or manifest injustice". *McDonald*, 810 P.2d at 1267. Consequently, we decline to reconsider the issue.

Although the reasons for so doing have changed, our directions to the trial court upon remand following the first appeal remain in effect.

JUDGMENT REINSTATED

HODGES, C.J., LAVENDER, V.C.J., SIMMS, HARGRAVE, WATT, JJ., concur.

KAUGER, SUMMERS, JJ., concur in part, dissent in part.

OPALA, WILSON, JJ., dissent.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

No.68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W TRANSPORTATION, and ROY E. GRIFFIS, on behalf of themselves and all others similarly situated,
Appellants,

v.

OKLAHOMA TAX COMMISSION, ET AL.,
Appellees,

and

ASSOCIATED MOTOR CARRIERS OF OKLAHOMA. INC
Intervenor.

ALMA WILSON, J., with whom OPALA, J., joins, dissenting:

Today's opinion closes the state courts to a taxpayer's § 1983 action, which may have the effect of opening the federal courts to state tax challenges. *Dennis v. Higgins.* 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) requires a substantive remedy be afforded taxpayers aggrieved by state laws that violate the Commerce Clause. The Tax Injunction Act, 28 U.S.C. § 1341 requires the state to provide minimum procedural protection to taxpayers. The majority fails to recognize the distinction. Accordingly I must respectfully dissent, even though I would, as the Court does today, affirm the district court's dismissal of the § 1983 claim in this cause.

In *Private Truck Council of America. Inc. v. Oklahoma Tax Commission,* 806 P.2d 598 (Okla. 1991), this Court reversed the district court, holding that 68 O.S.Supp.1982 § 607.1 and 47 O.S.Supp. 1986, § 1120(K) violate the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, and allowing partial refunds of taxes

paid thereunder, but affirmed the district court's dismissal of the § 1983 claim. On certiorari, the United States Supreme Court ordered "that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Court of Oklahoma for further consideration in light of *Dennis v. Higgins*, 498 U .S. (1991)." *Dennis v. Higgins* holds that the Commerce Clause confers rights, privileges and immunities upon state taxpayers within the meaning of § 1983. The *Dennis* holding rests upon the Commerce Clause restriction on state power combined with the Due Process Clause entitlement to relief. Hence, *Dennis* allows a taxpayer to seek meaningful relief in a § 1983 action in state court where the state remedy does not provide meaningful relief from the exaction of taxes in violation of the Commerce Clause.

Similar to the instant cause, *Dennis* was a class-action suit by an Ohio motor carrier in the state court of Nebraska seeking declaratory and injunctive relief and recovery of state taxes paid pursuant to Nebraska's retaliatory tax statute and costs and attorney fees. The Nebraska trial court declared the challenged statute violative of the Commerce Clause, entered a permanent injunction, awarded attorney fees and costs under the common fund doctrine and dismissed the § 1983 claim. The dismissal of the § 1983 claim was challenged on appeal. Relying on *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), cert. denied, 469 U.S. 834 (1984), the Nebraska Supreme Court determined that Commerce Clause violations are not cognizable under § 1983 and affirmed the dismissal. The United States Supreme Court reversed and remanded for further proceedings, holding that a taxpayer has a right within the meaning of § 1983 to seek relief for Commerce Clause violations. The *Dennis* holding is grounded in the Commerce Clause and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco. Dept. of Business Regulation of Florida*, 496 U.S. 18 (1990):

> . . . The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South- Central Timber Development. Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984). In addition, individuals injured by state action may sue and obtain injunctive and declaratory relief. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco. Dept. of Business Regulation of Fla.,* 496 U.S. 18, 31 (1990). Indeed, the trial court in the case before us awarded such relief, and respondents do not contest that decision. We have also recently held that taxpayers who are required to pay taxes before challenging a state tax that is subsequently determined to violate the Commerce Clause are entitled to retrospective relief "that will cure any unconstitutional discrimination against interstate commerce during the contested period." *Id.,* at 51. *This combined restriction on state power and entitlement to relief under the Commerce Clause amounts to a "right, privilege, or immunity" under the ordinary meaning of those terms.* [Footnote omitted.]
>
> [Emphasis added.]

Dennis v. Higgins, 498 U.S. at 447.

McKesson Corp. V. Division of Alcoholic Beverages & Taxation, 496 U.S. 18, 110 S.Ct. 2250, 110 L.Ed.2d 17 (1990) was initiated to challenge Florida's liquor tax as violative of the Commerce Clause because of its preferences for liquor made from crops which Florida is adapted to growing. A similar tax scheme had been struck down in *Bacchus Imports. Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The Florida Supreme Court declared that the tax scheme violated the Commerce Clause and permanently enjoined its enforcement, but refused to order refund of the tax. The United State Supreme

Court addressed the question of whether prospective relief [declaratory and injunctive relief], by itself, exhausts the requirements of federal law where a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality. Because the exaction of a tax constitutes deprivation of property, the unanimous *McKesson* Court determined that prospective relief alone was not sufficient to satisfy the commands of the Due Process Clause of the Fourteenth Amendment. Analyzing the states' constitutional obligation to provide procedural safeguards against the unlawful exaction of taxes, *McKesson* sets forth three general categories of relief that would be meaningful under the Due Process Clause: 1) a remedy to redress taxpayer grievances before payment; or 2) a remedy for refund of the unlawful part of the tax from those who were required to pay it; or 3) imposition of back taxes on those who were not required to pay the tax resulting in the discrimination. The *McKesson* Court left the selection and fine-tuning of the relief to be afforded a taxpayer to each state, as long as the relief is meaningful — cures, at least partially, the mischief that has been done.

> . . . We have already noted that States have a legitimate interest in sound fiscal planning and that this interest is sufficiently weighty to allow States to withhold predeprivation relief for allegedly unlawful tax assessments, providing postdeprivation relief only. See *supra,* at 37. But even if a State chooses to provide partial refunds as a means of curing the unlawful discrimination (as opposed to increasing the tax assessment of those previously favored), the State's interest in financial stability does not justify a refusal to provide relief. As noted earlier, see *supra*, at 46, the State here does not and cannot claim that the Florida courts invalidation of the Liquor Tax was a surprise, and even after the trial court found a Commerce

> Clause violation the State failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax. And in the future, States may avail themselves of a variety of procedural protection against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions. See *supra,* at 45. Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation.
>
> Respondents also observe that the State's choice of relief may entail various administrative costs (apart from the "cost" of any refund itself [Footnote omitted.]). Cf. *Matthews, supra,* at 348 ("[T]he Government's interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed" when determining precise contours of process due). The State may, of course, consider such costs when choosing between the various avenues of relief open to it. Because the Florida Supreme Court did not recognize in its refund proceeding the State's obligation under the Due Process Clause to rectify the invalidity of its deprivation of petitioner's property, the court did not consider how any administrative costs might influence the selection and fine-tuning of the relief afforded petitioner. We leave this to the state court on remand.

McKesson. 496 U.S. at 50-51.

By its reliance on *McKesson* in finding that a Commerce Clause violation is within the meaning of § 1983, *Dennis* stands for the propositions that: 1) a state taxpayer is entitled to

meaningful relief from the payment of taxes which are subsequently determined to be violative of the Commerce Clause; and, 2) where the state remedies do not provide meaning relief, a state taxpayer may seek relief in state courts pursuant to 42 U.S.C. § 1983.[1] That is, I read *Dennis* as providing a § 1983 remedy to state taxpayers for Commerce Clause violations when, and only when, the state has failed to provide a remedy that affords meaning relief. Thus, rather than instruct our district courts to decline jurisdiction over a taxpayer's § 1983 claim, we should direct our district courts to entertain a taxpayer's § 1983 claim whenever in a case tendered to them the available state law remedies are found short of the "meaningful relief" requirement of the Due Process Clause.

Although the majority does not review the state remedies, its conclusion that the state law remedies available to the taxpayers herein are adequate is correct even under the "meaningful relief" requirement of the Due Process Clause as explained in *McKesson*. Oklahoma's predeprivation remedies afforded tax-

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[1] In light of the following authorities, *Dennis v. Higgins* can only be read as affording a taxpayer the right to file suit for violations of the Commerce Clause in state court under § 1983. Federal Courts may not render declaratory judgments as to the constitutionality of state tax laws. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Federal Courts may not grant damages relief in a § 1983 action challenging state tax law, if taxpayers have an adequate state remedy for protection of their federal right. 28 U.S.C. § 1341 and *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). Absent waiver by the state or a valid congressional override, the Eleventh Amendment bars damages actions against States and state officers in their official capacity in federal court. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Federal law is part of the Law of the Land and enforceable in state court. *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Claims pursuant to 42 U.S.C. § 1983 may be maintained in our district courts. *Martin v. Harrah Independent School District*, 543 P.2d 1370 (Okla. 1975) and *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986).

payers are limited to situations where the authority of the assessing entity is challenged or where the tax has not become due and payable.[2] Oklahoma's postdeprivation administrative remedies with the right of appellate review are limited only by time restrictions, while the district court remedies are further limited.[3]

1. Where a taxpayer fails to report and pay or under-reports and under-pays, the Oklahoma Tax Commission may issue a proposed assessment and the taxpayer may seek an administrative hearing on the proposed assessment by way of a written protest before the payment of the tax. 68 O.S. 1991, § 221. However judicial review of the protest by appeal may not be had without payment of the proposed assessment under protest and, if the taxpayer prevails the taxes paid under protest will be refunded. 68 O.S.1991, § 225.

2. Where a taxpayer has voluntarily reported and paid taxes, the taxpayer may claim a refund of taxes paid within three years from the date of the claim alleging erroneous payment. 68 O.S.1991, § 227.[4]

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[2] An Oklahoma taxpayer may not maintain an action to enjoin the collection of a tax. *Oklahoma Tax Commission v. Harris,* 191 Okla. 28, 126 P.2d 685 (1942). However, an Oklahoma taxpayer may maintain a declaratory judgment action to challenge the validity of a taxing statute on its face before the tax becomes due, *Oklahoma Tax Commission v. Smith,* 610 P.2d 794 (1980), or to challenge the authority of the assessing entity. *United Airlines, Inc. v. State Board of Equalization.* 789 P.2d 1305 (Okla. 1990).

[3] Citation is to the 1991 codification of the statutes providing taxpayer remedies. Although these statutes may have been amended since this suit was instituted and since the 1991 codification, the substance of the taxpayer remedies have not changed. Also, the remedies outlined herein are not intended to be exhaustive. Each of the various tax codes contain additional remedies or restrictions peculiar to the tax. For instance, income tax refunds are authorized and limited by 68 O.S.1 991, § 2373. See, *Strelecki v. Oklahoma Tax Commission,* 872 P.2d 910 (Okla. 1993).

[4] Taxpayers who did not protest the payment of a tax under a statute which is subsequently declared unconstitutional have a statutory right to

If the refund is denied at the division level, the taxpayer may seek an administrative hearing on the claim. 68 O.S.1991, §§ 227 and 228. Judicial review of the claim for refund by appeal may be had, and if the taxpayer prevails the taxes erroneously paid during the previous three years will be refunded. 68 O S.1991, § 225.

3. Where a taxpayer voluntarily reports but pays the tax under protest, as the motor carriers did in this cause, the taxpayer may claim a refund and seek an administrative hearing on the challenge to the payment. 68 O.S.1991, § 207. Judicial review of the challenge by appeal may be had, and if the taxpayer prevails the taxes paid under protest will be refunded. 68 O.S.1991, § 225.

4. In addition to the administrative and judicial review provided in 68 O.S.1991, §§ 207, 221, 227 and 225, a taxpayer may seek review in the state district court. 68 O.S.1991, § 226.[5] The state district court remedy is limited to challenges of taxes under federal law. 68 O.S.1991, § 226(C).[6] If the challenged

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recover taxes paid within the time limits prescribed. *Sun Oil Company v. Oklahoma Tax Commission*, 620 P.2d 896 (1981). The *Sun Oil* case involved refund of use taxes that were declared unconstitutional in an original action before this Court in *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978).

[5] Subsection (a) of Section 226, as amended by 1990 Okla. Sess. Laws, ch. 339, § 16, provides:

> (a) In addition to the right to a protest of a proposed assessment as authorized by Section 221 of this title, a right of action is hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or enforcement of the rules and regulations of the Tax Commission relating to the collection of any state tax; however, such remedy shall be limited as prescribed by subsection (c) of this section.

[6] The judicial remedy granted in § 226 is limited to cases which meet the statutory delineated criteria 1) an unlawful burden on interstate commerce, 2) violative of Acts of Congress or the United States Constitution, or 3) in

taxes have not been paid, the taxpayer must pay under protest within thirty days from the mailing of the assessment and give notice of intent to file suit. 68 O.S.1991, § 226(B).[7] Similarly situated taxpayers may likewise pay the tax under protest and, upon request, enter into an agreement to be bound by the decision in another taxpayer suit, rather than file a separate suit. 68 O.S. 1991, § 226(D). If the taxpayer prevails the taxes paid under protest will be refunded. 68 O.S.1991, § 226(B).[8]

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cases where jurisdiction is vested in any of the courts of the United States. *Cimarron Industries. Inc. v. Oklahoma Tax Commission*, 621 P.2d 539 (Okla. 1980), wherein we decided that the taxpayer failed to bring itself within § 226 and thus should have exhausted its administrative remedies. Subsequently in *Ladd Petroleum Corporation v. Oklahoma Tax Commission*, 767 P.2d 897 (Okla. 1989), this Court concluded that there is no requirement of exhaustion of administrative remedies under § 226. The dispositive issue in *Ladd* was whether the trial court erred in sustaining the Oklahoma Tax Commission's demurrer to the evidence on the basis that the taxpayer was not entitled to maintain an action under § 226 because it failed to present evidence of a violation of federal law. Allowing taxpayers to assert federal challenges in district court without the necessity of exhausting administrative remedies avoids needless litigation when the administrative agency has no authority to declare a tax statute void as contrary to federal law. *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843, (Okla. 1990).

[7] Pursuant to § 226, the payment of a proposed assessment under protest within thirty days is jurisdictional and may not be extended under the provisions of § 221 that allow an extention of time to file a protest and seek an administrative hearing. *Ladd Petroleum Corporation v. Oklahoma Tax Commission*, 619 P.2d 602 (Okla. 1980).

[8] In *Stallings v. Oklahoma Tax Commission*, appeal No. 73,769, opinion promulgated on July 19, 1994, this Court ruled that § 226 provides a district court remedy to a taxpayer against whom the OTC has issued a proposed assessment. *Stallings* denied a § 226 action to the taxpayers who had overpaid taxes and claimed the presence of a federal constitutional infirmity by means of an unlawful exaction. The *Stallings* opinion could bring Oklahoma's postdeprivation remedies below the "meaningful relief" demanded by federal due process as to those taxpayers who self-assess an illegal exaction as required by the tax reporting and paying statutory provisions.

These postdeprivation taxpayer remedies allow the refund of taxes paid under protest and the refund of erroneous payment of taxes during the preceding three years. Where the tax is challenged under federal law, the district court remedy allows taxpayers to seek refund of the taxes paid under protest without the necessity of multiple suits. With these postdeprivation remedies, Oklahoma preserves its fiscal affairs from disruption except for the refund of taxes paid under protest or taxes paid voluntarily during the preceding three years. Where suit is filed in district court, Oklahoma has further protected its fiscal security by allowing a single suit for the determination of a violation of federal law thereby dispensing with the costs of multiple suits. These postdeprivation administrative and judicial remedies afforded taxpayers in Oklahoma fit neatly within the "meaningful relief" requirement of the Due Process Clause of the Fourteenth Amendment as pronounced in *McKesson*.

The district court denied the § 1983 claim herein, for failure to state a claim, and the attendant § 1988 attorney fees request. Because my review of extant jurisprudence convinces me that the state remedies which were affordable to these taxpayers in this case satisfy the "meaningful relief" standards, I would affirm the district courts dismissal of the § 1983 and § 1988 claims herein.

Even though I would reach the same result reached by the Court today, the flaw in the majority's rationale must be discussed. Following *State v. Quill,* 500 N.W.2d 196 (N.D. 1993), cert. denied 114 S.Ct. 173, the majority opinion holds that our state courts should decline to grant relief under § 1983 to a taxpayer aggrieved by a tax statute that violates the Commerce Clause because the federal courts are prohibited from granting such relief under 28 U.S.C. § 1341 . Section 1341, the Tax Injunction Act of 1937, provides that the federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and

efficient remedy may be had in the courts of such State." The federal Tax Injunction Act appears to defer to state remedies similarly to *McKesson*. But, neither the majority nor the *Quill* court recognize the procedural/substantive demarcation. The "plain, speedy and efficient" remedy in state court requirement in § 1341 is a procedural requirement. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981). The "meaningful relief" requirement of the Due Process Clause as pronounced in *McKesson* is a substantive requirement. Oklahoma's taxpayer remedies satisfy the minimum procedural requirements of § 1341. *Cities Service Gas Co. v. Oklahoma Tax Commission*, 656 F.2d 584 (1 0th Cir. 1981) cert. denied, 454 U.S. 1124, following *Rosewell*. However, it does not necessarily follow that those same remedies are meaningful under the Due Process Clause. Hence, *Quill* may be no more than a primrose path.

Quill is not virtually identical to this cause, as the majority says. North Dakota sought declaratory judgment in its state court that Quill Corp., as an out-of-state entity doing substantial mail order business in the state, was required to collect, report and remit state use tax. Quill Corp. had refused to collect the North Dakota tax — that is, Quill Corp. had not been deprived of any property right except maybe for the cost of defending the declaratory judgment. Quill Corp. filed a counter claim alleging it was entitled to relief under § 1983. The North Dakota Supreme Court upheld the tax statute which imposed the collection duty on an out-of-state vendor, concluding that the statute is consistent with *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) and that *National Bellas Hess. Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967) is obsolete. Quill Corp.'s counterclaim was dismissed. On certiorari, the United States Supreme Court reversed the North Dakota Supreme Court, concluding that the statute violated the Commerce Clause, refused to overrule *National Bellas Hess* and

remanded the cause to the state for further proceedings. *Quill Corporation v. North Dakota*, ___U.S. ___, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). In *Quill*, the High Court does not mention the dismissal of § 1983 claim, nor did it remand in light of *Dennis v. Higgins*. The North Dakota Supreme Court was not concerned with a meaningful *McKesson* refund relief as is involved herein. Thus, *Quill* is readily distinguishable and should not be readily followed. Further, the *Quill* rationale does not fall within the guidelines set by the United State Supreme Court in *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), for state courts to decline jurisdiction over one category of § 1983 claims.

Predicating a §1983 taxpayer suit upon the inadequacy of the available state remedies is consistent with the aftermath of *Dennis*. The United States Supreme Court has said that "§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law. *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868,112 L.Ed.2d 969 (1991)." *Livadas v. Bradshaw,California Labor Commissioner*. ___ U.S. ___ 114 S.Ct. 2068, 2083 (1994). Further, in *Heck v. Humphrey*, ___ U.S. ___, 62 USLW 4594 (decided June 24, 1994), the Court said that a § 1983 action would be denied a prisoner, unless and until the conviction or sentence is reversed, expunged, invalidated or impugned by the grant of habeas corpus.

APPENDIX B

PRIVATE TRUCK COUNCIL OF AMERICA, INC., **Circle W. Transportation, Inc.. and Roy E. Griffis, On behalf of Themselves and all Others Similarly Situated,**
Appellants,

v.

OKLAHOMA TAX COMMISSION, et al.,
Appellees,

and

Associated Motor Carriers of Oklahoma, Inc.,
Intervenor.

No. 68401

Supreme Court of Oklahoma

June 28, 1990

As Amended March 5, 1991.

Appeal from the District Court of Oklahoma County; John M. Amick, Trial Judge.

Class action by and on behalf of non-resident motor carriers challenging the constitutionality of retaliatory/third-tier taxes imposed on non-Oklahoma residents operating foreign based motor carriers, pursuant to 47 O.S.1986 Supp. § 1120(K) and 68 O.S. 1982 Supp. § 607.1. District court upheld constitutionality of challenged taxes, denied appellant's motion for summary judgment, including declaratory and injunctive relief, tax payment refunds, costs and attorneys fees, and rendered final judgment for appellees.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

William B. Rogers & Associates, by William L. Rogers and Ronald C. Palmatary, Oklahoma City, and Zuckert, Scoutt, Rasenberger & Johnson, by Richard A. Allen and Andrew R. Plump, Washington, D.C., for appellants.

Oklahoma Tax Com'n by Joe Mark Elkouri and Stanley Johnston, and Office of the Atty. Gen., by Thomas L. Spencer, As Intervenor, Oklahoma City, for appellees.

Kimball, Wilson & Walker, by Thomas G. Ferguson, Jr., Oklahoma City, for intervenor.

DOOLIN, Justice.

Appellants Private Truck Council of America, Inc., Circle W. Transportation, and Roy E. Griffis, (Truckers)[1] have chal-

[1] Trucker, Private Truck Counsil of America, Inc., (PTCA), is a non-profit business association incorporated in 1939 under the laws of New York, with its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies operating trucks and related equipment as private carriers. A large number of PTCA's member companies, oeprating in interstate commerce through Oklahoma, register their vehicles in states against which the Oklahoma Tax Commission retaliates under the authority contained in §§ 1120(k) and 607.1. PTCA's principal purpose is to protect and promote the interests of its members by a variety of activities, including disseminating information, undertaking educational activites, lobbying Congress and state legislatures on regulatory issues affecting private carriers, and engaging in litigation of this kind on behalf of its members. Trucker, Circle W, a subsidiary of Westinghouse Electric Corporation, provides transportation primarily for that company throughout the nation, with fifteen vehicles that are registered in Pennsylvania. Those vehicles paid Pennsylvania's annual $36.00 per axle tax, and according were also subject to Oklahoma's corresponding retaliatory tax. In 1984, for example, Circle W, through Westinghouse, paid Oklahoma $1,080.00 in mirror taxes.

Trucker, Roy E. Griffis and his wife, Freida Griffis, reside in Bearden, Arkansas, and began a trucking business in January 1984. The Griffises operate in several states, including Oklahoma. Their truck is registered in Arkansas, and accordingly they have paid Oklahoma's retaliatory tax of $175.00 per year and its retaliatory fuel marker fee of $10.00 per year.

lenged the constitutionality of 47 O.S.Supp. 1986 § 1120(K) and 68 O.S.Supp. 1982 § 607.1. The questioned statutes impose fees and taxes on out of state motor carriers, operating in Oklahoma, in the same manner and extent that Oklahoma based motor carriers are taxed in other states. The pivotal issue presented is whether 47 O.S. § 1120(K) and 68 O.S. § 607.1 discriminate on their face against interstate commerce and nonresident motor carriers in violation of both the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, cl. 1. Other issues before this Court are whether Truckers are entitled to reimbursement of litigation expenses and reasonable attorneys' fees, and whether Truckers are entitled to refunds, and if so, whether retroactive or prospective application is appropriate.

I. Factual Background

In its overall taxing scheme, the State of Oklahoma imposes several fees and taxes on all motor carriers operating within its borders. At the "first tier", the State imposes an annual registration fee, determined by the vehicle's total weight, for all trucks and related equipment operating in the State. 47 0.S.Supp.1985 § 1101 et seq. As a participating member of the International Registration Plan (IRP), an apportioned interstate registration system, Oklahoma also shares its registration fees for Oklahoma based-motor carriers, engaged in interstate commerce, with other participating IRP States, wherein the motor carrier travels. 47 O.S.1985 § 1120.

In return, Oklahoma receives a percentage of nonresident motor carrier's total registration fee which is determined by dividing the vehicle's actual mileage within Oklahoma by its overall total mileage for the preceding year. Thus, with respect to motor carriers engaged in interstate commerce, Oklahoma's total registration fees are determined by the vehicle's registration fee, and its percentage share of the vehicle's in-state mileage. 17 0.S.1985 § 1120(B). No Oklahoma motor carrier is

required to pay more than one full registration fee, nor does the State impose registration fees against motor carriers based in non-IRP States. Although Oklahoma does not share its registration fees with non-IRP States, the appellee, Oklahoma Tax Commission, is "authorized and empowered to enter into and make reciprocal compacts and agreements" with non-IRP States. 47 0.S.1985 § 1123.

At the "second tier", the State also imposes a tax on all motor carriers, regardless of their state of registration, for the use of motor fuel within the State. Additionally, a number of special excise taxes are imposed on the use of diesel fuel. 68 0.S.1981 §§ 501 and 601 et seq.

Beyond the traditional registration fees and fuel taxes is a "third tier" tax. Such taxes are known as "mirror" or "retaliatory" taxes, and are also called "third structure" taxes. Third structure taxes are neither apportioned nor prorated, and examples include: ton-mile taxes, based on the truck's weight and miles driven in the taxing state; axle taxes, a flat charge based on the number of axles on each vehicle; annual fuel marker fees, and trip fees.

In the instant case, retaliatory taxes and fees are imposed solely on certain nonresident motor carriers whose vehicles are registered in states that impose third tier taxes on heavy trucks registered in Oklahoma.[2] The Oklahoma Legislature, by enact-

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[2] Section 1120(K) provides in pertinent part: In addition to those taxes or fees imposed by sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or, approximate total amount, of any fee or tax, including property, motor fuel, excise, sale, use or milage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

Section 607.1 provides in pertinent part:

In addition to those taxes or fees imposed by Articles 5, 6, and 7 of this title, the same or, substantially the same type or category of tax or fee may be

ing the "mirror" statutes in 1982, intended that registration and licensing fees, and motor fuel taxes "assessed against residents of other states operating similar vehicles in Oklahoma be comparably the same as the (fees and taxes) assessed against residents of Oklahoma operating a similar vehicle for a similar purpose in such other state." 47 0.S. § 1120 (K), and 68 0.S. § 607.1(D).

In 1983, the Oklahoma Tax Commission started imposing mirror fees and taxes against motor carriers with vehicles registered in 25 states.[3] The retaliatory taxes and fees, varying in amount, are wholly dependent upon the vehicle's state of registration, because the taxing scheme mirrors the fees and taxes imposed by that state as a condition precedent to the use of that state's highways by Oklahoma based carriers.[4] The revenues generated by these fees and taxes are distributed and used for the construction and maintenance of the highways and roads in the State of Oklahoma.

II. Procedural Background.

Truckers filed this class action, on behalf of themselves and all other persons similarly situated, on December 17, 1984. With respect to the Commerce Clause, Truckers keenly recognized

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imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for, the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sales, use or mileage tax required by the laws of such other state making the same or similar use of a like vehicle in such state.

[3] These are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Nevada, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[4] For example, because Arkansas imposed a nonapportioned flat-fee of $175.00 per year against resident and nonresident motor carriers, Oklahoma retaliated by imposing the same fees against Arkansas registered carriers doing business in the state. *See* Ark.Code Ann. tit. 27, § 27-35-205 (1983) (repealed 1987).

that a State may require persons engaged in interstate commerce to pay their fair share of state taxes.[5] However, Truckers argued that Oklahoma's retaliatory fees and taxes are a blatant and an egregious violation of the Commerce Clause, because they discriminate, on their face, against nonresident motor carriers. Truckers sought a declaratory judgment declaring Oklahoma's retaliatory statutes unconstitutional, and also requested a permanent injunction against collection of the challenged taxes, refunds of all taxes and fees paid by class members, and attorneys' fees and cost. After having its "class action" certified as such pursuant to 12 O.S. Supp.1987, § 2023(B)(1)(b) and (B)(2), Truckers moved for summary judgment.

The Tax Commission argued that Truckers' frontal attack upon the constitutionality of Oklahoma's statutes could not be determined without a "cost impact" analysis. Since Truckers failed to produce any factual evidence showing actual damages, measured in dollars and cents, resulting from the alleged discriminatory intent or effect of the statutes, the Tax Commission urged the district court to reject Truckers' claim of facial unconstitutionality.

While not representing any party in this case, the Oklahoma Attorney General and the Associated Motor Carriers of Oklahoma, Inc., were granted permission to intervene pursuant to 12 0.S.Supp. 1984, § 2024. Since the imposition of third structure taxes upon Oklahoma base-registered operators of motor carriers constitutes a barrier to conducting interstate business in that taxing state, both intervenors, and the Tax Commission, asked the trial court to uphold the constitutionality of the disputed statutes, because the Oklahoma Legislature further promoted interstate commerce by equalizing the third tier taxation burden.

Finding "no disputed material issues of fact," the district court denied Truckers' motion for summary judgment. The

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[5] Maryland v. Louisiana, 451 U.S. 725, 754, S.Ct. 2114, 2133, 68 L.Ed.2d 576 (1981).

court further upheld the constitutionality of both retaliatory statutes, and granted final judgment to the Tax Commission, as a matter of law. In its memorandum opinion, the district court expressly acknowledged that the Supreme Judicial Court of Maine had struck down Maine's reciprocal truck taxes as a violation of the Commerce Clause.[6]

Curiously, the district court also noted that the Maine Supreme Judicial Court had found unpersuasive, and "refused to accord any precedential value" to an earlier New Jersey trial court decision which upheld New Jersey's retaliatory truck tax.[7] The Maine Court found that "any significance accorded the Supreme Court's 1974 summary disposition of *B & L Motor Freight* must yield to supervening 'doctrinal developments.'" *See Private Truck Council,* 503 A.2d, at 218 n. 7.

Nevertheless, our district court, relying on the United States Supreme Court's summary disposition of *B & L* to support its contention that "the matter was no longer open to question," concluded:

> It would seem that the view taken by the New Jersey Court is better reasoned and more in accord with the views of the United States Supreme Court. It is the actual effect on interstate commerce that we must consider, not the form of the statute. It seems to me that the purpose of the reciprocal laws is to motivate all states to abandon excessive taxes on out-of-state truckers, and I am not willing to say that such laws are

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[6] *Private Truck Council v. Secretary of State,* 503 A.2d 214 (Me.1986), *cert. denied* 476 U.S. 1129, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986).

[7] *B & L Motor Freight, Inc. v. Heymann,* 120 N.J.Super. 270, 293 A.2d 711 (Ch.Div.1972), affd mem., 125 N.J.Super. 372, 311 A.2d 184 (App. Div.1973), certif. denied, 64 N.J. 494, 317 A.2d 707 (1974), appeal dismissed, 419 U.S. 1042, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974), reh'g denied, 420 U.S. 913, 95 S.Ct. 837, 42 L.Ed.2d 845 (1975). *But see* n. 11 infra and accompanying text .

either an undue burden on interstate commerce or that they violate the privileges and immunities clause.

Truckers appeal alleging that the district court erred in upholding the constitutionality of the challenged statutes. Truckers also contend that because the disputed statutes are facially unconstitutional, they are entitled to refunds of the fees and taxes collected and cost under the federal Civil Rights Act, 42 U.S.C. § 1983.

III. A United States Supreme Court Procedural Ruling is not a precedential decision.

Initially, we must address the Tax Commission and Intervenors' contention, apparently adopted by the court below, that the United States Supreme Court's summary dismissal of *B & L* is binding precedent on this Court, regardless of our approval or disapproval of the Commerce Clause analysis contained in the opinion. In brief, the Attorney General asserts that "*B & L Motor Freight* is now a decision of the United States Supreme Court," and that "if it is to be overturned only the United States Supreme Court may do so."

We disagree and reject these contentions, because they float in the sea of frivolity. The United States Supreme Court has made it "quite clear" [8] that its

> summary dismissals are, . . ., to be taken as rulings on the merits, . . ., in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.' ***They do not, however, have the same***

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[8] *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979). In the same vein, we stated this limitation in *Turpen v. Okla Corp. Comm'n*, 769 P.2d 1309, 1315 (Okl.1988): summary dispositions are a "source of authority for state courts, but the precedential weight of that summary disposition is confined to the narrowest possible grounds."

> ***precedential value here as does an opinion of this Court after briefing and oral argument on the merits,*** .... A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. ***It does not, as we have continued to stress. . . , necessarily reflect our agreement with the opinion*** of the court whose judgment is appealed. ***It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.*** [Emphasis added] [Citations omitted].

Where the constitutionality of a state statute is questioned, summary actions by the Supreme Court of the United States, except for their persuasive value, have no final or binding effect on this Court. Nor can such summary actions be regarded as precedent in later cases presenting the precise question previously subjected to summary action.[9] It is the prerogative of this Court to determine whether this State's statutes pass constitutional muster. As we previously stated, "[t]he interpretation of state legislation and the 'construction placed upon state statutes by our highest court is binding upon the United States Supreme Court.' "[10]

In the instant case, *B & L* is irrelevant, because the New Jersey Supreme Court has agreed with one of its lower courts in overruling *B & L.* In striking down New Jersey's third tier taxes and fees that state's Superior Court, Appellate Division, agreed with the Supreme Judicial Court of Maine's assessment and concluded:

> While we entertain doubts about whether the discrimination question was decided in that case, we need not

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[9] *Id.*

[10] *Ingram v. Oneok,* 775 P.2d 810, 813-14 (Okl. 1989), quoting *United States v. Home Federal S.& L. Ass'n of Tulsa,* 418 P.2d 319, 325 (Okl. 1966).

decide the issue because we are satisfied that in any event *B & L* **must yield to supervening doctrinal development,** .., which requires a different result. [11] [Emphasis added.]

The Attorney General's contention that since 1972 "no doctrinal developments have occurred which would affect this issue," is inconsistent with the cases cited in brief.[12] Despite the fact that the United States Supreme Court struck down Pennsylvania's marker fee and axle tax as impermissible under the Commerce Clause,[13] the Attorney General, citing *Western and Southern Life Insurance Company v. State Board of Equalization,* 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) as precedent, asserts that this Court should uphold the constitutionality of the challenged statutes, because "Congress has clearly expressed its intent to allow the States the power to tax interstate motor carriers free from attacks under the Commerce Clause." 49 U.S.C. § 10521. Admittedly, state regulation and taxation of insurance companies are not subject to Commerce Clause limitations because Congress has exempted the insurance industry from Commerce Clause coverage.[14] However, state taxation of motor carriers engaged in interstate commerce remains fully

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[11] *Private Truck Council v. State,* 221 N.J.Super. 89, 534 A.2d 13 (1987), aff'd per curiam "For the reasons expressed in the opinion of the Appellate Division," 111 N.J. 214, 544 A.2d 33 (1988). The Superior Court of New Jersey also noted that our district court's opinion, which heavily relied upon *B & L is* the only decision "upholding a counterpart fee similar to New Jersey's." *See Private Truck Council,* supra, 534 A.2d, at 17 n. 4.

[12] *See generally, American Trucking Ass'ns, Inc. v. Gray,* 288 Ark. 488, 707 S.W.2d 759 (1986) (Upholding the constitutionality of Arkansas' Highway Use Equalization tax), vacated and remanded 483 U.S. 1014, 107 S.Ct. 3252, 97 L.Ed.2d 752 (1987), rev'd on remand as a violation of the Commerce Clause, 295 Ark. 43, 746 S.W.2d 377 (1988).

[13] *See American Trucking Ass'ns v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987).

[14] *See* McCarren-Ferguson Act, 15 U.S.C. § 1011, et seq.

subject to the strictures of the Commerce Clause. The Supremacy Clause, U.S. Const., Art. VI, cl. 2, and the Attorney General's recognition of *Scheiner,* supra note 13, fully supports our conclusion.

IV. The questioned statutes are plainly discriminatory.

The Commerce Clause is the origin of Congressional authority "To regulate Commerce ... among the several States, and with the Indian Tribes.[15] More important for the purposes of this appeal, the Clause also implicitly limits the State's power to discriminate against interstate commerce.'[16] The fundamental "purpose of the Commerce Clause was to create an area of free trade among the several States." [17] The essential tenet of the Commerce Clause is that no State may practice economic protectionism by imposing "a tax which discriminates against interstate commerce . . . by providing a direct commerical advantage to local business." [18] In its continuous task of defining the limits of the Commerce Clause on State power, the Supreme Court has observed: [19]

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[15] U.S. Const., Art. 1, § 8, cl. 3.

[16] *H.P. Hood & Sons, Inc. v. Dumond* 336 U.S. 525, 532-533, 69 S.Ct. 657, 662, 93 L.Ed. 865 (1949); *Hughes v. Oklahoma* 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). "[E]ven in the absence of a congressional exercise of this power, the Commerce Clause 'prevents the States from erecting barriers to the free flow of interstate commerce.'" *AmericanTrucking Ass'n, Inc. v. Larson,* 683 F.2d 787, 790 (3d Cir.) [quoting *Raymond MotorTransportation, Inc. v. Rice,* 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978)], *cert. denied,* 459 U.S. 1036, 103 S.Ct. 448, 74 L.Ed.2d 603 (1982).

[17] *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327, 330, 64 S.Ct. 1023, 1026, 88 L.Ed. 1304 (1944).

[18] *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959); *Bacchus Imports, Ltd v. Dias,* 468 U.S. 263, 268, 104 S.Ct. 3049, 3052, 82 L.Ed.2d 200 (1984).

[19] *See Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977), quoting *Dean Milk Co. v. Madison,* 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951).

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects.

As the district court aptly noted, the Supreme Court of the United States has set forth a four-prong test for determining the validity of state statutes affecting interstate commerce: a state tax will pass constitutional muster only if (1) the activity being taxed has a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state.[20] Although the district court restated the preceding four-part test in its opinion, it did not scrutinize the challenged statutes under all four parts of the test. It is apparent that the district court erred in denying Truckers' constitutional attack.

Obviously, as asserted by Truckers, Oklahoma's retaliatory statutes do not pass the third and fourth prongs. Both statutes impose excessive fees and taxes on out-ofstate registered motor carriers that are not imposed on Oklahoma registered motor carriers. "[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause." [21]

Appellees' contention that the mirror taxes and fees are fairly related to the services provided by the state, that is, the

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[20] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977). *See also, Maryland v. Louisiana*, 451 U.S., at 754, 101 S.Ct.. at 2133.

[21] *Scheiner*, 483 U.S., at 286, 107 S.Ct., at 2841. *See also, Amencan Trucking Ass'ns, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), *cert. denied* 483 U.S. 1020, 107 S.Ct. 3262, 97 L.Ed.2d 761 (1987); *Department of Revenue v. Private Truck Council of America, Inc.*, 531 So.2d 367 (Fla.App. 1 Dist.1988).

cost of construction and maintenance of Oklahoma's highway system, is unavailing. All motor carriers, having paid one state's registration fee, are free to travel all the roads in that jurisdiction, and are entitled to freely operate in the interstate market by making commerical entrances into all the States.[22] Appellees' argument must fail because they confuse a tax on the privilege of using this State's highways with a tax on the privilege of engaging in interstate commerce. "[T]he Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States."[23] In considering the state's entire scheme of taxation, we note that Oklahoma does not impose any complementary or offsetting taxes on comparable intrastate motor carriers engaged in interstate commerce.[24] Neither the Tax Commission nor Intervenors have shown that such a compensatory tax exists in Oklahoma. Finding no equality of treatment between local in-state and out-of-state interstate commerce carriers, we must conclude that the ultimate effect of the statutes are not compensatory in nature, because they favor intrastate business interest.[25] Next, we reject the Tax Commission's adverse dollars and cents "cost-impact" argument. In the present

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[22] *Scheiner*, 483 U.S., at 283, 107 S.Ct., at 2840. *See also, Private Truck Council of America*, 517 A2d. at 1154.

[23] *Scheiner*, 483 U.S., at 282, 107 S.Ct., at 2839. Oklahoma's mirror taxes are indistinguishable from Pennsylvania's unapportioned flat tax. Consequently, the challenged taxes also fail to pass the "internal consistency test" imposed in *Scheiner* 483 U.S., at 284, 107 S.Ct., at 2840: "To pass the internal consistency test, a state tax must be of the kind that, 'if applied by every jurisdiction there would be no impermissible interference with free trade.' (Citation omitted.) If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred."

[24] *See Maryland v. Louisiana*, 451 U.S., at 75658, 101 S.Ct., at 2134-135.

[25] *Id*, at 758-59, 101 S.Ct., at 2135.

case, no record establishing the economic burden of the challenged taxes on out-of-state carriers is required. The Supreme Court of New Hamshire, invalidating a similar New Hampshire tax, [26] observed that:

> A factual record delineating the greater burden on out-of-state vehicles is necessary only if the statute does not discriminate on its face.... Knowledge of the amount of discrimination imposed by a statute is not necessary to decide that it discriminates. ***'We need not know how unequal the the tax is before concluding that it unconstitutionally discriminates.'*** [emphasis ours].

We also find that the legislative purpose in enacting the challenged statutes and the district court's conclusion that such defensive measures are justified by their purpose runs afoul of the "very purpose of the Commerce Clause [in] creat[ing] an area of free trade among the several States." [27] Appellees' contention that the Legislature enabled the state's taxing scheme to cancel the discriminatory effect that other state taxes impose on Oklahoma based carriers is unpersuasive. Discrimination cannot be corrected by retaliatory discrimination.[28] Retaliatory legislation, designed to motivate a sister State to cease its alleged unconstitutional tax burden on interstate commerce, has no legitimate State purpose and is a wholly unacceptable legislative remedy.[29] The appropriate remedy for another state's unconsti-

[26] *Private Truck Council of America v. State*, 128 N.H. 466, 517 A.2d 1150, 1153-154 (1986), quoting *Maryland v. Louisiana*, 451 U.S., at 760, 101 S.Ct., at 2136. *See also, Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540, reh'g denied 469 U.S. 912, 105 S.Ct. 285, 83 L.Ed.2d 222 (1984).

[27] *McLeod supra*, n. 17.

[28] *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920).

[29] *Great Atlantic Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976); *New Energy Co. v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988); *Private Truck Council*, 534 A.2d, at 17.

tutional burden on interstate commerce in an action under the Commerce Clause itself.[30]

Truckers' challenge to the constitutionality of 47 O.S. § 1120(K) and 68 0.S. § 607.1 under the Commerce Clause must be upheld, and in that respect, we reverse the district court. We hold that both statutes violate the fundamental requirement of nondiscrimination against interstate commerce. There is no equality of treatment, because Oklahoma does not impose any compensatory tax on domestic carriers engaged in intrastate or interstate commerce. In light of our disposition of Truckers' discrimination claim, we find it unnecessary to fully address their constitutional challenge under the Privileges and Immunities Clause.[31]

V. Truckers are entitled to a partial refund.

We now turn to the principal thrust of Truckers' appeal of the district court's opinion denying Truckers' request for re-

[30] *A & P Tea Co.*, 424 U.S.. at 379-80. 96 S.Ct., at 931-32. "A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a commerce Clause violation." *Private Truck Council* 503 A.2d, at 218. *See also Private Truck Council of America* 517 A.2d. at 1154.

[31] In this class action, Truckers stand in the shoes of all non-Oklahoma businesses operating in interstate commerce as private motor carriers. However, in its corporate capacity, Truckers are not natural persons nor "citizens of each state ... entitled to all Privileges and Immunities of Citizens of the several States." U.S. Const. art IV, § 2, cl. 1. corporations are not entitled under anicle 4. § 2, Const. U.S., to all privileges and immunities of citizens in the several states. "*Nelson v. Deming Inv. Co.*, 21 Okl. 610, 614, 96 P. 742, 743 (1908), citing *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 15 LEd. 451(1856), and *Paul v. Virginia*, 75 U.S. 8 Wall.)168, 181, 19 L.Ed. 357 (1869). *See also Western & Southern Life Ins. Co.*, 451 U.S., at 656, 101 S.Ct., at 2076-77. Consequently, we hold Truckers are not entitled to protection under the Privileges and Immunities Clause. While quite novel and innovative, we also reject Truckers' argument to create, here on appeal, a sub-class consisting only of the Griffises, so this court may address the Privileges and Immunities Clause claim of all other non-corporate members of this class action. Only a district court may certify a sub-class action. *See* 12 O.S.1985

funds of all taxes previously paid pursuant to the challenged statutes. Truckers assert that they are entitled to a refund of all retaliatory taxes and fees pursuant to 42 U.S.C. § 1983. Nearly $12,000,000.00 was collected under the statutes from April, 1983 through October, 1987. We affirm the district court's denial of Truckers' federal claim for refunds under § 1983. Oklahoma has an adequate State remedy affording the requested relief.

The Commission argues that Truckers' requested relief is contrary to Oklahoma law. The Commission contends that Oklahoma law requires Truckers to pay the taxes under protest, and then file suit to recover the taxes so paid under this alleged misinterpretation of law.[32] The Commission seems to argue that a class action for refunds may not be brought in Oklahoma, for it asserts that Truckers' monetary relief, if any, is limited to a refund of taxes paid in 1984, and then only to the named motor carriers. The Commission desires this court to limit recovery to Circle W. Transportation and Roy E. Griffis in the amount of $1,265.00. Finally the Commission argues that the only other relief available to Truckers' class is a declaratory judgment as to the constitutionality of the statutes.

In our view, the Commission's argument totally misconceives the specific statutory provision authorizing an action for declaratory and injunctive relief, including abatement of the challenged taxes, and a refund. 68 O.S.1981, § 226. This special tax refund statute, § 226(a), reads in part: "In addition to the right to a protest . . ., a right of action is hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law." This all-in-one legal remedy is

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supp. § 2023(C)(4) [When appropriate: (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class]. *See also Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okl.1984).

32 *Sun Oil Co. v. Okla. Tax Comm'n*, 620 P.2d 896 (Okl.1980).

further limited to cases "where the taxes complained of are 1) an unlawful burden on interstate commerce, 2) violative of Acts of Congress or the United States Constitution, or 3) in cases where jurisdiction is vested in any of the courts of the United States."[33] Truckers satisfied the first statutorily delineated criterion. Furthermore, Truckers gave proper notice on December 14, 1984, as required by § 226(b), and "service of process upon the Chairman of the Tax Commission" was properly made as mandated by § 226(c). The legal avenues for bringing an action under § 226(c) are not expressly limited, there is no requirement that a taxpayer seek and exhaust administrative remedies. However, there is a requirement that a taxpayer must pay the taxes under protest or at the time of payment give notice of an intent to file a lawsuit.[34] Truckers complied with the proscribed statutory method mandated by the legislature.

The Commission's argument also implicitly challenges the standing of Private Truck Council of America (PTCA), because PTCA is not itself an aggrieved taxpayer, and has suffered no concrete injury resulting from the challenged statutes. This contention is without merit. As we noted at the outset, PTCA is a voluntary business association, with 1,800 companies as members. *See* n. 1 supra. PTCA's associational standing to prosecute this action as the representative of its constituents is clear under

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[33] *Cimarron Industries, Inc. v. Okla. Tax Comm'n*, 621 P.2d 539. 542 (Okl.1980).

[34] Section 226 (d) provides:

> Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the couns for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.

However § 226(d) is inapplicable to the instant cause inasmuch as it is a certified class action. Neither appellee nor intervenors have argued "that the trial court abused its discretion in certifying this class action." *Shores v. First City Bank*, 689 P.2d. at 301.

prior decisions of the United States Supreme Court.[35] The Supreme Court of the United States "has recognized that an association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity."[36] In determining whether an association has standing, the United States Supreme Court has:

> recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the Lawsuit[37]

With respect to Truckers' claim for declaratory and injunctive relief, we have no doubt that PTCA satisfies the above criteria. In its petition, PTCA alleged that many of its members are subject to the challenged taxes since its members have vehicles registered in states against which Oklahoma retaliates; thus, PTCA's members would have standing in their own right to assert a justiciable case. The interests that PTCA seeks to protect are definitely germane to the 51 year old association's purpose. Finally, PTCA's Commerce Clause claim, request for declaratory and injunctive relief, and refunds does not require individualized proof of such claim, inasmuch as such financial

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[35] *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 LEd.2d 1488 (1958); *National Motor Freight Assn v. United States*, 372 U.S. 246, 83 S.Ct. 688, 9 LEd.2d 709 (1963); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 LEd.2d 636 (1972); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434. 53 L.Ed.2d 383 (1977). *see*, e.g., n. 44 infra. This court has also recognized the standing of an association to seek relief on behalf of it members: *Democratic Party of Oklahoma v. Estep*, 652 P.2d 271 (Okl.1982); *Oklahoma Ass'n of Municipal Attorneys v. State*, 577 P.2d 1310 (Okl. 1978).

[36] Hunt. 432 U.S., at 342, 97 S.Ct., at 2441.

[37] Hunt, 432 U.S., at 343, 97 S.Ct., at 2441

information is readily available from the records of the Commission.

Consequently, we must determine the question as to whether our ruling is to operate (1) retroactively from the time the taxes were first collected in 1983, (2) quasi-prospectively from the date of the *Scheiner* decision, or (3) prospectively. In *Griggs v. State el rel. Okla. Dept. of Trans.*,[38] we observed that:

> Retroactive operation of an overruling decision is neither required nor prohibited by the United States Constitution. Judicial policy determines whether, and to what extent, a new rule will operate retroactively. In *Chevron Oil Co v. Huson*, [404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)], the United States Supreme Court isolated three factors for ascertaining when retroactivity of a new pronouncement should be restricted: (1) at the threshold, the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or on an issue of first impression whose decision is not clearly foreshadowed; (2) the court must weigh the merits and demerits of applying the rule retroactively by considering the rule's prior history, its purpose and effect, and whether retroactivity will further or retard its operation; and (3) the court must consider the inequity flowing from retroactive application, including unfairness and hardship to the parties.

The Attorney General argues that if the tax statutes are declared unconstitutional, this court should make its decision prospective only and award no refunds. In analyzing Trucker's claim for retroactive application, the Attorney General relies heavily upon ***First McAlester Corporation v. Okla. Tax***

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[38] 702 P.2d 1017, 1020 (Okl.1985).

Comm'n,[39] and applies the three-prong test enunciated in *Chevron Oil Co* to the instant case. The Attorney General concludes that a prospective remedy would be sufficient relief, because Truckers are freed from paying the taxes, and a retroactive judgment would be fiscally disruptive to the State of Oklahoma. Because tax statutes are strictly construed against the state,[40] the Attorney General has not met the state's burden of presenting the required equitable predicate for this court to adopt a rule of pure prospectivity in this exceptional case.[41]

We are not at all persuaded by the Attorney General's argument, for it is bottomed on the ill-fated premise concerning the binding effect of the United States Supreme Court's summary dismissal of *B & L*, which we rejected in Part III supra. *B & L* was not adopted by the Supreme Court, nor did it establish a new binding principle of law so as to constitute a clear change in Commerce Clause jurisprudence as established by previous Supreme Court decisions. Even if this court substituted a more plausible alternative for B & L, i.e., the *Scheiner* opinion, in our view, that decision does not represent a clear break with past Commerce Clause precedent.

Although it is true that the Supreme Court did not overrule any clear past precedent in *Scheiner*, we observe that such a requirement is non-sequitur under the approach articulated in *Chevron*.[42] It is our belief that the Supreme Court in *Scheiner* did decide an *issue of first impression* by declaring the revenue implementation methodology employed by Pennsylvania's unapportioned flat tax unconstitutional. But, we must also recognize that the Supreme Court implicitly concluded that its

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[39] 709 P.2d 1026 (Okl.1985).

[40] *Oklahoma Tax Commn v. McAfee*, 461 P.2d 602, 605 (Okl.1969).

[41] *Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980).

[42] *See Gosa v. Mayden*, 413 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973).

resolution of *Scheiner* was foreshadowed by a long line of precedent invalidating unapportioned flat taxes.[43] We also observe that previous state court decisions may have foreshadowed the *Scheiner* pronouncementt.[44] Thus, the state of Oklahoma can not argue that it was surprised by the results reached in *Scheiner*. Nevertheless, for the purposes of this case, we hold that *Scheiner* did establish a new constitutional principle.

The Supreme Court's pronouncement was 'new' in the sense that it decisively impeded a tax revenue practice accepted and relied upon by a number of states. Although *Scheiner* did not expressly overrule Oklahoma's retaliatory tax statutes, we cannot ignore the fact that the Supreme Court denounced the purpose and effect of the statutes in question.[45] Given the explicitness of the *Scheiner* pronouncement, we find it difficult to conceive and justify any continued good faith reliance upon the constitutionality of the laws after the *Scheiner* opinion. Notwithstanding the state's limited reliance interest under the threshold *Chevron* factor, we believe that *Scheiner's* newly established constitutional principle can not, without resulting in manifest injustice and inequity, be applied under a pure prospective approach.

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[43] *Scheiner*, 483 U.S., at 280-87, 107 S.Ct., 2838-842.

[44] *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me.1986), *cert. denied* 476 U.S. 1129, 106 S.Ct. 1997, 90 L.Ed.2d 677 (1986); *American Trucking Assn, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), *cert. denied* 483 U.S. 1020, 107 S.Ct. 3262, 97 L.Ed.2d 761 (1987); *Private Truck Council v. State*, 128 N.H. 466, 517 A.2d 1150 (1986). *See also Commonwealth of Kentucky, Transportation Cabinet v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65 (Ky.1988); *American Trucking Ass'ns, Inc. v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988); *Black Beauty Trucking, Inc. v. Indiana Dept. of State Revenue*, 527 N.E.2d 1163 (Ind.Tax 1988); *Owner Operators Independent Drivers Ass'n of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989); *American Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1335 (Vt. 1989).

[45] "Such taxes can obviously divide and disrupt the market for interstate transportation services. In practical effect, . . ., the taxes are plainly discriminatory." *Scheiner*, 483 U.S., at 285-86, 107 S.Ct., at 2841.

The next factor of the *Chevron* standard is whether retroactive operation will further or retard the purpose of the Commerce Clause. The central "purpose of the Commerce Clause was to create an area of free trade among the several States." [46] As a practical matter, retroactive application would not necessarily advance the further development of Commerce Clause jurisprudence, because interstate commerce must pay its fair share of tax burdens for the governmental services it enjoys.[47] Furthermore, the Oklahoma Legislature has significant interest in exacting from interstate commerce its fair share of the cost of state government." [48] However, unlike the situation presented in *First McAlester*, the Commission has not informed this court that it ceased collecting the taxes after the *Scheiner* opinion. Truckers have paid and are paying more than their proportionate share of the tax burden imposed on those non-residents engaged in interstate commerce. Furthermore, in light of the *Scheiner* decision, no appellee has conceded that the disputed statutes are unconstitutional, nor has the Oklahoma legislature repealed the state tax law. We will not retard the implementation of the *Scheiner* decision. Under these circumstances, the purpose criteria tip towards retroactive application of *Scheiner*.

Considering the inequities presented, if this court afforded complete retroactive application, and ordered refunds with interest as provided by § 226(b), obviously, we would impose a significant financial hardship upon the State in exercising its governmental functions. This we decline. On the other hand, the fact remains that this court can not, consistent with constitutional limitations, retard the very purpose of the Commerce Clause by permitting the State to violate the Commerce Clause

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[46] *McLeod*, supra, n. 17

[47] *Maryland v. Lousiana*, supra, n.5

[48] *Department of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Co.*, 435 U.S. 734, 748, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978).

and reap the financial benefits under a discriminatory tax law. To allow this application of nonretroactivity would deter any taxpayer's incentive to challenge the tax laws, and in the instant case, deny Truckers the benefit of the ruling in *Scheiner*. Furthermore, this state's statutory refund provision would have no effect other than providing an illusory and empty victory. We can not allow the Commission to retain all funds collected after *Scheiner*. In light of the presumption of prospective application of state court decisions invalidating tax statutes,[49] and after a careful balance of the three *Chevron* factors, coupled with a showing of inequity on both parties in this exceptional case, we hold that Truckers are entitled to a partial refund pursuant to § 226. Truckers claim for refunds before June 23, 1987, the effective date of the *Scheiner* opinion, are denied.

Truckers also contend that they are entitled to attorneys fees as provided under 12 0.S.1981 § 18(C) and 42 U.S.C. § 1988, including the costs of this action. Subsequent to Truckers' present action, the Oklahoma Legislature repealed § 18(C), with the adoption of this State's Pleading Code, 12 0.S.Supp.1984, § 2001 et seq. Truckers can not recover attorneys fees under a statute not applicable at the time they instituted this action, because they had no rights accrued thereunder.[50] Nor may Truckers recover attorneys fees under § 1988 for the adjudicated Commerce Clause violation.[51]

The judgment of the district court is REVERSED. On their face both §§ 1120(K) and 607.1 violate the fundamental require-

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[49] *National Can Corp. v. State of Washington Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286, 1292-93 (1988).

[50] Okla. const., Art. 5, § 54 *See also Gayman v. Mullen*, 58 Okla. 477, 161 P. 1051 (1916).

[51] *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir.1984); *Private Truck Council of America, Inc*, 503 A.2d 214; *Private Truck Council of America, Inc. v. State of New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *State v. Private Truck Council of America, Inc.*, 258 Ga 531, 371 S.E.2d 378 (1988).

ment for non-discrimination against interstate commerce. Pursuant to § 226(b) the Oklahoma Tax Commission shall determine what amount of refund is due for tax periods or portions of tax periods occurring after June 23, 1987.[52] In the case of those taxes and fees reported and paid on the quarterly basis, for quarterly periods commencing July 1, 1987, and thereafter, together with interest. The refund shall be paid in the manner and from the accounts as provided by 68 O.S.Supp.1989, § 225(d). This cause is REMANDED to the District Court for a final determination of interest as provided by statute, calculated from the dates set forth in this paragraph, entry of judgment as to that amount, including notification to all class members as determined by the tax rolls of the Commission, and further proceedings not inconsistent with the views expressed herein.

HARGRAVE, CJ., and SIMMS, KAUGER and SUMMERS. JJ.. concur.

OPALA, V.C.J., LAVENDER, J., concur in part; dissent in part.

HODGES, J., dissents.

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[52] The United States Supreme Court in *America Trucking Assn's v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 110 L.Ed. 2d 148 (1990), found that the critical event for prospectivity is not the payment of the money but the occurrence of the underlying transaction. It further found that it was more equitable to refund the taxes paid for the 1987-88 tax year because if states collect prior to 1987 for those taxes then the parties would not be allowed a refund.

APPENDIX C

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, *et al.*,
Plaintiffs

vs.

STATE OF OKLAHOMA, et al.,
Defendants

ASSOCIATED MOTOR CARRIERS
OF OKLAHOMA, INC.,
Intervenor

MEMORANDUM OPINION

The plaintiffs, Private Truck Council of America, Inc., a nonprofit New York corporation, Circle W. Transportation, a Delaware corporation, and Roy E. Griffis, an unincorporated motor carrier registered in Arkansas, contend that Oklahoma Statutes 68 O.S.A. § 607.1 and 47 O.S.A. § 22.5 j (k) (now 47 O.S.A. §1120 (K)) are unconstitutional as to them and the members of the class they represent, and they ask for declaratory and injunctive relief, for a refund of all taxes collected under these statutes and for attorneys fees.

In Count I of the petition, plaintiffs contend that these taxes are in violation of the Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution); in Count II they assert that these taxes violated the Privileges and Immunities Clause (Article IV, Section 2).

In Count III of their petition, plaintiffs seek damages under 42 U.S.C. §1983 for violation of their constitutional rights, and for attorneys' fees under 42 U.S.C. § 1988.

The statutes under attack impose taxes called "mirror" or retaliatory taxes and they are sometimes called "third structure" or "third tier" taxes. The effect of these statutes is to tax motor carriers which operate in Oklahoma but are base-registered in another State in the same manner and to the same extent that Oklahoma based carriers are taxed in that other State.

The plaintiffs have moved for summary judgment in their favor on the ground that there is no issue of material fact in issue, and that they are entitled to judgment as a matter of law.

I have previously held that Count III should be dismissed insofar as all corporate plaintiffs are concerned, for the reason that the privileges and immunities clause is not applicable to corporations. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Calif.*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed 2d 514 (1981).

Defendants have moved to dismiss Count III on the ground that the commerce clause does not secure rights cognizable under 42 U.S.C. §1983. Though there is some authority arguable to the contrary, the most persuasive authority on this point, in my opinion is the case of *Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (3rd Cir. 1984). In that case it was squarely held that although the appellant was successful in its assertion that an Iowa statute was in violation of the Commerce Clause, this did not establish a deprivation of any right, privilege, or immunity secured by the United States Constitution within the meaning of 42 U.S.C. §1983. It follows that Count III should also be dismissed insofar as all corporate plaintiffs are concerned.

Thus, the questions left to be decided are (1) whether or not the taxes violate the Commerce Clause; (2) whether or not such taxes violate the Privileges and Immunities Clause insofar as the individual members of the Plaintiffs' class are concerned, and (3) If so, whether or not the individual plaintiffs are entitled to damages and attorney fees.

A tax analogous, in some respects, to the Oklahoma tax under attack here was a tax enacted by California against non-resident insurance companies. The constitutionality of that tax was considered in *Western, see supra.*

That case clearly held that such taxes are not a violation of the Equal Protection Clause of the 14th Amendment. It is not authority on the question of the validity of the tax under the Commerce Clause for the reason that Congress has given the State the power to regulate the insurance business; nor is it authority on the validity of the tax under the Privileges and Immunities Clause for the reason that the plaintiff in that case was a corporation, and that clause in inapplicable to corporations, *Western, supra* at 655.

The facet of that case which would seem to be helpful here is the view of the purpose and effect of such taxes taken by the court. Justice Brennan, in writing the opinion of the Court, quoted the California Court of Appeals in saying:

> "[T]he purpose of the retaliatory tax is to put pressure on the several states to impose the same tax burden on all insurance companies, foreign or domestic, and thereby encourage the doing of interstate business."

and at page 672:

> "But whether in fact the provision will accomplish its objectives is not the question: The Equal Protection Clause is satisfied if we conclude that the California legislature rationally could have believed that the retaliatory tax would promote its objective."

The Court concluded that it could not say that the California legislature's conclusion was irrational or even unreasonable.

The parameters of decision under the Commerce Clause are set forth in *Complete Auto Transitt, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 326 (1977) . It was there held that the practical effect, not the formal language of the tax statute

should be considered by the courts, and that the tax should be sustained if:

1. It has a substantial nexus with the Taxing State;

2. It is fairly apportioned;

3. It does not discriminate against interstate commerce; and

4. It is fairly related to the services provided by the State.

In that case the appellant, a Michigan corporation, hauled automobiles which came by rail to Jackson, Mississippi to other points within the State. These automobiles had been shipped into Mississippi from assembly plants outside the State. The tax was five percent of the gross income of the business within the State. This tax was upheld as meeting all four of the criteria.

In *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981), a so-called "first use" tax imposed by the State of Louisiana on natural gas coming from the Outer Continental Shelf and passing through Louisiana to other States was held to violate the Commerce Clause since residents of Louisiana were largely immune from this tax. The Court said that this tax provided direct commercial advantage to local business. The Supreme Judicial Court of Maine has recently considered the question of the validity of a law in that State which imposed a reciprocal or retaliatory tax, and concluded that such a tax is a constitutionally impermissible burden on interstate commerce. *Private Truck Council of America, Inc. et al. v. Secretary of State*, 503 A.2d 214 (1986). In that case, the Maine Court simply held that the taxing statute was facially discriminatory because it levies a tax on certain foreign registered trucks which it does not levy against Maine-registered trucks. The Maine Court refused to accord any precedential value to a New Jersey case upholding such a tax. In that case the Supreme Court dismissed the appeal for want of a federal question. Three members of the Supreme Court would have noted probable jurisdiction and set the case for oral argument. *B & L Motor Freight, Inc. v.*

Heymann, 293 A.2d 711, *aff'd without opin.*, 311 A.2d 184, *cert. denied*, 317 A.2d 707 (N.J. 1974), *app'l dislm'd*, 419 U.S. 1042 (1974).

The opinion of the New Jersey Court was in a lower court, which very clearly and explicitly discussed the commerce clause at length, and concluded that the New Jersey statute did not violate the commerce clause.

The Maine Court consigned the action of the United States Supreme Court to a footnote, stating that such a summary disposition may mean only that the issues were not there refined with sufficient clarity, precision and certainty desirable before the Supreme Court undertakes review.

What would seem more probable since the United States Supreme Court has in the past upheld these reciprocal taxes was that the matter was no longer open to question. The New Jersey Court said *id.* at 715:

> Reciprocal (not retaliatory) features of state laws imposing taxes on motor vehicles came before the court in Bode v. Barrett, 344 U.S. 583, 73 S.Ct. 468, 97 L.Ed. 567 (1953) and in Storaasli v. Minnesota, 283 U.S. 57, 51 S.Ct. 354, 75 L.Ed. 839 (1931). In *Bode* the appellants were motor truck operators engaged in interstate as well as intrastate commerce. They attacked the constitutionality of an Illinois law imposing a tax for the use of that state's highways and measuring the tax exclusively by the gross weight of the vehicle. The law was held valid and among the arguments rejected by the court was this: That the statute should be held unconstitutional because it required Illinois residents to pay the tax and at the same time exempted non-residents if the states of their residence reciprocated by granting like exemptions to Illinois residents. *Storassli* was cited as controlling.

and further, *id.* at 716:

> State legislation which has the effect of regulating interstate commerce is sometimes valid, sometimes invalid. If the regulation takes the form of a reciprocal (retaliatory) statute, the use of that form will not make unconstitutional a state requirement which would otherwise be valid for a foreign corporation engaged in interstate commerce. This view of existing law is supported by In re Insurance Tax Cases., 160 Kan. 300, 161 P.2d 726 (1945), aff'd wtihout opinion Prudential Ins. Co. of America v. Hobbs, 328 U.S. 822, 66 S.Ct. 1360, 90 L.Ed. 1602 (1946). That decision followed the general rule and sustained insurance laws having a retaliatory feature.

It would seem that the view taken by the New Jersey Court is better reasoned and more in accord with the views of the United States Supreme Court.

It is the actual effect on interstate commerce that we must consider, not the form of the statute. It seems to me that the purpose of the reciprocal laws is to motivate all states to abandon excessive taxes on out-of-state truckers, and I am not willing to say that such laws are either an undue burden on interstate commerce or that they violate the privileges and immunities clause.

It is therefore the order and judgment of this court that the plaintiffs motion for summary judgment be overruled.

APPENDIX D

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

NO. CJ- 84-9902

PRIVATE TRUCK COUNCIL OF AMERICA INC., *et al.*,
Plaintiffs,

STATE OF OKLAHOMA, et al.,
Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND ALTERNATIVE MOTION FOR ESCROW OF TAXES

[Filed Apr. 1,1985]

This matter comes on for hearing in its regular order on the 29th day of January, 1985, upon plaintiffs' motions for a preliminary injunction prohibiting the defendants, during the pendency of this action, from assessing or collecting taxes and fees on motor carriers, pursuant to 68 O.S. Supp. 1982,. § 607.1 and 47 O.S. Supp. 1982, § 22.5 (K); or, in the alternative, for a temporary order of this Court impounding all funds collected thereunder into an escrow account and prohibiting the defendants from disbursing the proceeds of any and all such taxes and fees collected pursuant to said statutes.

All parties appearing by counsel, and the Court, having heard the arguments of counsel, having read the pleadings, briefs, and memoranda of law filed in connection therewith, having examined the affidavits in support of said motions and the exhibits introduced, and being fully advised in the premises, the Court finds:

1. That plaintiffs have an adequate remedy at law;

2. That plaintiffs have failed to show that the denial of either of such motions will cause irreparable injury to plaintiffs; or that sufficient emergency exists to require the granting of either of such motions.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary injunction and alternative motion for escrow of taxes be, and hereby are DENIED.

/s/ William S. Myers, Jr.
Chief Judge

APPENDIX E

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-84-9902

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

vs.

STATE OF OKLAHOMA, OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Individually as Chairman of the Oklahoma Tax Commission, ROBERT L. WADLEY, Individually and as Vice-Chairman of the Oklahoma Tax Commission, J.L. MERRILL, Individually and as Secretary-Member of the Oklahoma Tax Commission, and LEO WINTERS, Individually and as State Treasurer of Oklahoma,

Defendants.

TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS had before the Honorable William S. Myers, Jr., Judge of the District Court of Oklahoma County, Oklahoma, on the 29th day of January, 1985.

[2] APPEARANCES

ON BEHALF OF THE PLAINTIFFS:

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ON BEHALF OF THE DEFENDANTS:

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F. Andrew Fugitt
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73102

Mr. Stanley Johnston
Oklahoma Tax Commission,
Legal Division
M.C. Connors Building
Oklahoma City, OK 73105

[3] (Thereupon) and on the 29th day of January, 1985, with Mr. Rogers, Mr. Billig and Mr. Allen appearing as counsel for the Plaintiffs and Mr. Spencer, Mr. Fugitt and Mr. Johnston appearing as counsel for the Defendants, the following is the ruling of the Court:)

THE COURT: Are we ready for the Court's ruling? Apparently so.

I want to thank counsel for their briefs and for the fine manner in which they presented their argument to the Court.

I do think that Plaintiff's characterization of the tax as retaliatory is correct. I think that ultimately, these taxes, where a state imposes a burden on interstate commerce to get even for what has been done to its truckers, will be struck down and will cease to exist. I think ultimately, the Plaintiffs will probably prevail in this case. There are other questions, of course, that go to whether this Court should grant an Injunction, be it a Temporary Injunction, and also whether the Court. should impound funds. One thing that I think is very important is the fact that this has been collected for nearly two years already and I'm looking to see the emergency nature of it. I am most confident that there will be an appeal from either party who does not prevail when the matter is decided ultimately on the merits by the assigned judge and this should take place, I would think, within the next thirty to sixty days, considering the speed with which such matters are decided. I think that there is substantially an adequate remedy provided by law. I recognize it doesn't cover the cost of preparing the necessary paperwork which all businessmen are inundated with today. Considering the very small amount that is involved on any one individual in the next thirty to sixty days and weighing that, to some extent, against the myraid of problems that would be created by an impoundment on a temporary basis prior to the resolution of this matter on its merits, I am going to decline to grant the Temporary Injunction or to impound funds. However, I will talk to the assigned judge and explain to him the fact that there should be a decision made on it promptly and see if he can't give you a quick hearing date on the merits. Thank you.

(END OF PROCEEDINGS.)

APPENDIX F

47 O.S. Supp. 1986 §1120 (K) provided in pertinent part:

> In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sale, use or mileage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

68 O.S. Supp. 1982 § 607.1 provided in pertinent part:

> In addition to those taxes or fees imposed by Articles 5, 6, and 7 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise sales, use or mileage tax required by the laws of such other state making the same or similar use of a like vehicle in such state.

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

No. 68,401

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,
CIRCLE W TRANSPORTATION, INC.,
and ROY E. GRIFFIS, on behalf of themselves
and all others similarly situated,

Appellants,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Appellees,

and

ASSOCIATED MOTOR CARRIERS
OF OKLAHOMA, INC.,

Intervenor.

ORDER

The parties are directed to file simultaneous briefs on or before the 11th of March 1994, on the following issues:

1. What is the effect of *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991), on Appellants' coextensive state law claims, including Appellants' right to attorney's fees in this case?

2. Is the Oklahoma Tax Commission liable for an attorney's fee under 42 U.S.C. § 1988 in this matter?

3. Because the Oklahoma Tax Commission is required by law to enforce statutes, which may be ultimately found

unconstitutional, should that fact defeat Appellants' claim to attorney's fees in this case?

4. What effect, if any, should we give to the trial court's denial of attorney fees in this litigation?

5. Is a § 1988 attorney's fee mandatory or discretionary under *Dennis*?

Consideration of Appellants' Motion to Remand is deferred until resolution of the foregoing issues.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 24TH DAY OF FEBRUARY, 1994.

\s\ Ralph B. Hodges
CHIEF JUSTICE

ALL THE JUSTICES CONCUR.

APPENDIX H

NON-WHOLLY OWNED SUBSIDIARIES OF WESTINGHOUSE ELECTRIC CORPORATION

ADEPT Technologies
AEG-Beteiligunagesellschaft MBH
AEG-Westinghouse Transportation Systems, Inc.
Airship Industries, Ltd.
CEEC Investments Incorporated
Challenger Electrical Equipment Corporation
CEEC Holdings Incorporated
Computer Aided Training Company, Incorporated
Cypher Communications Technology, Inc.
Edge Emitter Technology, Inc.
Eletromar Industria Eletrica Brasileira, S.A.
Eletromar Nordeste, S.A.
Email Westinghouse Pty., Limited
Enwesa Servicos, S.A.
Eregli Demir ve Celik Fabrikalori, A.S.
Escorts, Ltd.
Gamma Metrics
Industria IEM, S.A. de C.V.
Infrared Fiber Systems, Inc.
Shaw-Walker Company, The
Siam Toracato de Tella, Ltd.
Silectra S.A. de C.V.
Speech Plus
Texas PFC, Inc.
Inova Microelectronics, Inc.
Integrated Communication Systems, Inc.
Alma Industries
Corporate Interiors, Inc.
Beaux Arts Group of Florida, Inc. (The)
Corporate Environments of Minnesota, Inc.
Corporate Environments of Tennessee, Inc.
Stillman/Estes, Inc.
Gaviform
Knoll International (SEA) Ltd.
Knoll Hong Kong PTE Ltd.
Knoll Malaysia Sdn. Bvd.
Lyn (PTE) Limited
Topform Postforming (PTE) Ltd.
Shaw-Walker Company (The)
Mecanica Pesada, S.A.
Mex Control S.A. de C.V.
Micros Systems Inc.
Photocomm, Inc.
Powerex, Inc.
Project Funding Corporation
Serratosa & Castells, S.A.
Contadores Electricos, C.A. (CONTELCA)
Elektrik Technizati Imalti Tesisati, A.S.

Theta J. Corporation
Turbine Metal Technologies, Inc.
United Western Telchnologies Corp.
Vektron S.A.
WB Bottling Corporation
W.S. Industries (India) Ltd.
Westinghouse-Airship Industries, Inc.
Westinghouse de Argentina, S.A.
Group W. Radio, Inc.
Metron, Inc.
Herbinger*EDI Services, Inc.
Westinghouse Electro Metalurgicas C.A. (WEMCA)
Westinghouse do Brasil S.A. (WEBSA)
Eletromar Industria Electrica Brasileira, S.A.
Westinghouse Electric Australia Holdings Limited
Email Westinghouse Private, Ltd.
Email Westinghouse Properties
Horiba Westinghouse, Ltd.
Hyosung Heavy Industries, Ltd.
Industria Electrica de Mexico, S.A.
Industria IEM, S.A. de C.V.
Industria et Technologie de la Machine Intelligentie (ITMI)
ISCOSA Industries and Maintenance, Ltd.
Mex Control, S.A. and C.V.
Reftrans, S.A.
Silectra, S.A. de C.V.
Societe Generale de Travaux Electriques (SGTE)
ETIC BV Rotterdam
Westinghouse de Argentina, S.A.
Westinghouse Asia Controls Corporation (WEASIA)
Westinghouse Electric Australia Holdings Limited (WEAHL)
Cemac Westinghouse Pty. Ltd.
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Societe Generale de Travaux Electriques (SGTE)
Westinghouse Plasma Systems International, N.V.
Westinghouse Saudi Arabia Ltd. (WSAL)
Integrated Sensors, Inc.

Jerry Thompson &
Associates, Inc.
Westinghouse Industria
Electrica Brasileira S.A.
Westinghouse Motor
Company
WEXICO Systems and
Services, Ltd.

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-688

In the
Supreme Court of the United States
October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a "plain, speedy and efficient remedy" is available under state law for Commerce Clause or other Constitutional or federal law challenges to state tax laws, and, as in this case, that state law remedy was successfully pursued, are the state courts, in view of the principles of federalism and comity, *required* by federal law to entertain a coextensive claim under 42 U.S.C. §§ 1983 and 1988?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINION BELOW	1
ADDITIONAL STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
STATE LAW HAS PROVIDED PETITIONERS AN INDEPENDENT, CONSTITUTIONALLY COMPLETE, AND ADEQUATE REMEDY IN THIS CASE, AND THE STATE COURT IS NOT REQUIRED TO ENTERTAIN A COEXTENSIVE FEDERAL LAW CLAIM WHERE STATE LAW PROVIDES THE REMEDY	7
1. The decision below does not conflict with either *Dennis v. Higgins* or *Howlett v. Rose*, neither of which dealt with the issue involved here	7
2. The decision below does not conflict as to any federal question with the applicable decisions of state courts of last resort regarding the question presented, but is consistent with them.	10
CONCLUSION	14
APPENDIX	1a

TABLE OF AUTHORITIES

PAGE

CASES

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) 8

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 8

Atlantic Richfield Co. v. State, 659 P.2d 930, (Okla. 1983) 14

Backus v. Chilivis, 224 S.E.2d 370 (Ga. 1976) 11

Bloomingdale's By Mail Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992) 12

Brooks v. Nance, 801 F.2d 1237 (10th Cir. 1986) 13

Cities Service Gas Co. v. Oklahoma Tax Comm'n, 656 F.2d 584 (10th Cir.), *cert. denied*, 454 U.S. 1124 (1981) 13

Davis v. City of Elkhorn, 393 N.W.2d 95 (Wis. App. 1986) 11

Dennis v. Higgins, 498 U.S. 439, 111 S.Ct. 865 (1991) 4,9

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 11

Howlett v. Rose, 496 U.S. 356 (1990) 6,7,10

TABLE OF AUTHORITIES (cont'd)

PAGE

CASES (CONT'D)

Johnston v. Gaston County, 323 S.E.2d 381 (N.C. App. 1984) 11

Linderkamp v. Bismark School District No. 1, 397 N.W.2d 76 (N.D. 1986) 9,11

L. L. Bean, Inc. v. Bracey, 817 S.W.2d 292 (Tenn. 1991) 12

Matter of Estate of Bartlett, 680 P.2d 369 (Okla. 1984) 14

Private Truck Council of America, Inc. v. Oklahoma Tax Com'n, 806 P.2d 598 (Okla. 1990) 3,8,13

Private Truck Council of America, Inc. v. Oklahoma Tax Com'n, 879 P.2d 137 (Okla. 1994) ..... *passim*

Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) 9

Spencer v. South Carolina Tax Comm'n, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) ... 11,14

State v. Quill Corp., 500 N.W. 2d 196 (N.D. 1993), *cert. denied*, 114 S.Ct. 173 (1993) ..... *passim*

TABLE OF AUTHORITIES (cont'd)

PAGE

CASES (CONT'D)

Stufflebaum v. Panethiere, 691 S.W.2d 271 (Mo. banc 1985) 11

Vann v. DeKalb County Bd. of Tax Assessors, 367 S.E.2d 43 (Ga. App. 1988) 11

Wilborn v. City of Tulsa, 721 P.2d 803 (Okla. 1986) 13

Wilhelm v. Gray, 766 P.2d 1357 (Okla. 1988), *cert. denied*, 490 U.S. 1092 (1989) 12,13

Ziska v. Water Pollution Control Authority, 490 A.2d 509 (Conn. 1985) 11

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 3 2
28 U.S.C. § 1341 4,11,13
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1988 ..... *passim*
OKLA. STAT. tit. 68 § 226 (1981) ..... *passim*

OTHER

Robert L. Stern, et al., *Supreme Court Practice* 250 (7th ed. 1993) 4

In the
Supreme Court of the United States
October Term, 1994

No. 94–688

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Oklahoma Supreme Court of which Petitioners seek review, was rendered *sub nomine Private Truck Council of America, Inc. v. Oklahoma Tax Com'n*, and is reported at 879 P.2d 137 (Okla. 1994).

ADDITIONAL STATUTORY PROVISIONS

In addition to the Constitutional and statutory provisions cited by Petitioners, the following federal and state statutes are involved:

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

OKLA. STAT. tit. 68, § 226 (1981), which provides a right of action and affords a remedy to taxpayers who wish to challenge any state tax law or its enforcement as an unlawful burden on interstate commerce or violative of Acts of Congress or the United States Constitution, is set out in full in the Appendix to this Brief, at 1a.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) initially brought this action in state district court pursuant to OKLA. STAT. tit. 68, § 226 (1981) to recover taxes paid under protest, which taxes plaintiffs charged were violative of the Commerce Clause.[1] In Count III of their state court petition, plaintiffs alleged that the actions of the defendants[2] in collecting the taxes imposed by the challenged statutes were "taken under color of state law," and that defendants, Respondents here,

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] The original defendants were the State of Oklahoma, the Oklahoma Tax Commission, the Commissioners of the Tax Commission, both individually and in their official capacities, and the State Treasurer. The action was later dismissed as to the State, the State Treasurer, and the Tax Commissioners as individuals.

were therefore "liable" under 42 U.S.C. § 1983.[3] The plaintiffs thus sought attorney fees under 42 U.S.C. § 1988.

Defendants argued in favor of the statutes' constitutionality, and also challenged the plaintiffs' claim for attorney fees in a two-fold argument: (1) that a § 1983 claim could not be brought on Commerce Clause grounds; and (2) that a § 1983 claim is not cognizable in state court where a complete and adequate remedy (such as 68 O.S. 1981, § 226) is provided under state law to redress the plaintiffs' substantive claim.

The trial court upheld the tax statutes' constitutionality under the Commerce Clause, and also dismissed plaintiffs' § 1983 claim. That dismissal was based upon the court's conclusion that the Commerce Clause would not support a claim under § 1983.

On appeal, the Oklahoma Supreme Court reversed the trial court as to the constitutionality of the taxing statutes, holding them violative of the Commerce Clause, and ordered partial refunds.[4] That court agreed, however, that plaintiffs were not entitled to attorney fees, also upon the grounds that, under then extant jurisprudence, a § 1983 claim could not be maintained on Commerce Clause grounds. As with the trial court, although the existence and adequacy of the state-law remedy as grounds for dismissal of a § 1983 claim had been briefed on appeal by the Oklahoma Attorney General and by the Tax Commis-

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[3] No damages or relief were sought under § 1983, either in the form of declaratory or injunctive relief, or as refunds. Those remedies were available, and invoked, under state law, *ie.*, 68 O.S. § 226.

[4] 806 P.2d 598 (Okla. 1990).

sion, that issue was not addressed in the Oklahoma court's opinion.

Subsequent to the Oklahoma Supreme Court's decision on June 28, 1990, this Court ruled in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865 (1991), that suits for violations of the Commerce Clause *may* be brought under § 1983. As a result, on plaintiffs' petition for certiorari, this Court vacated the Oklahoma Supreme Court's opinion and remanded for further consideration in light of *Dennis*.[5]

On remand, the Oklahoma court recognized this Court's holding in *Dennis*, and acknowledged that, pursuant thereto, Commerce Clause violations do indeed provide a basis for the bringing of a § 1983 action. 879 P.2d at 138, 140, Pet.App. 1a, 5a. The court, however, went on to examine the pertinent issue of this case, which was not involved in *Dennis*: Are the state courts *required* to entertain such actions where, as here, a "plain, speedy and efficient remedy" is available—and successful—under state law?

The Oklahoma court first found—and Petitioners here do not challenge such conclusion—that Oklahoma law provides an adequate state remedy affording the relief the plaintiffs requested. 879 P.2d at 138, 139, Pet.App. 1a, 4a. Consequently, under the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, a federal court would be prohibited from entertaining Petitioner-plaintiffs' claim. *Id.*, at 138, Pet.App. 2a–3a. Thus that court, while acknowledging

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[5] In issuing such a summary reconsideration order, this Court told the Oklahoma court to reconsider the case "in light of the intervening precedent—which may or may not compel a different result." Robert L. Stern, et al., *Supreme Court Practice* 250 (7th ed. 1993).

that state courts have *jurisdiction* to consider § 1983 claims, found that the determinative issue in this case was whether, under principles of federalism and comity, the state courts were required to *exercise* that jurisdiction when tax challengers could receive constitutionally adequate relief under state law. *Id.*, at 140–142, Pet.App. 6a–11a. After reviewing the decisions and rationale both of this Court and of those state court decisions which considered *that* question—and those which did not—the court held that, under those principles, the exercise of such jurisdiction was not required under these circumstances. *Ibid.*

Accordingly, the court below found that plaintiff-petitioners had been afforded a plain, speedy and efficient remedy under state law which was adequate for 14th Amendment due process purposes, and that this Court's decision in *Dennis v. Higgins*, under these circumstances, did not compel a different result in this case. As the court said, "[a]lthough the reasons for so doing have changed," the trial court (and the Oklahoma Supreme Court) "reached the right result in declining to grant an attorneys' fee under §§ 1983 and 1988." *Id.*, at 142, Pet.App. 10a–11a. The prior judgment was reinstated. *Ibid.*

As will be shown, that decision is consistent with applicable decisions of this Court, and does not conflict as to any federal question with the applicable decisions of the highest courts of other states. Further review by certiorari is unwarranted, and should be denied.

REASONS FOR DENYING THE WRIT

This case is about attorney fees—nothing else. Contrary to Petitioners' claim, the Oklahoma Supreme Court in its opinion below did *not* rule, contrary to *Dennis v. Higgins*,

that suits for violation of the Commerce Clause could not be brought under § 1983. Rather, on remand, and as dictated by *Dennis*, that court specifically recognized that they could. Then, however, the court below examined the applicable decisions of this Court and those decisions of the state courts of last resort which have directly addressed the question, and held that state courts are not required to entertain § 1983 actions to challenge state tax laws where taxpayers have (and here utilized) a plain, speedy and efficient remedy under state law; and where Petitioners can and do receive fully adequate redress of their grievances thereunder.

Neither, as Petitioners claim, is the decision below contrary to *Howlett v. Rose*, 496 U.S. 356 (1990). Here, unlike *Howlett*, the state court did not attempt to deny to Petitioners the substantive relief protected by § 1983—the right to challenge the State's tax laws and to obtain declaratory relief and refunds. Rather, that relief was *granted*—under state law. Petitioners' complaint is that, while they received the full measure of relief under state law to which they are constitutionally entitled, they didn't get the attorney fees they wanted. However, neither *Dennis* nor *Howlett* guarantees them the extra windfall they would like.

Finally, Petitioners suggest that the states' courts of last resort are "sharply divided" on the question. Not so. According to Petitioners, the "question" is only whether § 1983 protects taxpayers' rights to challenge state laws, and to obtain relief from those found to be unconstitutional or violative of federal law. It certainly does that. What Petitioners omit to acknowledge, however, and what the majority, if not all, state court decisions have held, is that where those rights are protected under state law, and that state law provides a remedy to redress taxpayers' grievan-

ces satisfactorily and adequately under the Constitution, the state courts are not required to look elsewhere for another, or additional, remedy.

The Petitioners have received all the relief to which they are entitled. The petition for a writ of certiorari should be denied.

STATE LAW HAS PROVIDED PETITIONERS AN INDEPENDENT, CONSTITUTIONALLY COMPLETE, AND ADEQUATE REMEDY IN THIS CASE, AND THE STATE COURT IS NOT REQUIRED TO ENTERTAIN A COEXTENSIVE FEDERAL LAW CLAIM WHERE STATE LAW PROVIDES THE REMEDY.

1. The decision below does not conflict with either *Dennis v. Higgins* or *Howlett v. Rose*, neither of which dealt with the issue involved here.

The Petitioners argue that the decision below conflicts with *Dennis v. Higgins* and with *Howlett v. Rose*. However, as the court below correctly observed:

> Neither *Dennis*, nor *Howlett*, addressed the issue of whether a state court should decline to impose federal remedies *when state remedies are adequate* and a federal court would, therefore, be prohibited from enforcing such remedies under the Tax Injunction Act.

879 P.2d at 140–141, Pet.App. at 7a. (Emphasis added.) In the footnote to this observation, the court also noted that the state law remedies provided here, a refund of the taxes wrongly exacted, interest on those amounts, and an injunction prohibiting the collection of such taxes in the future, fully satisfied due process requirements. *Ibid.*

As noted earlier, the Petitioners brought an action in state court under the provisions of OKLA. STAT. tit. 68, § 226 (1981) for declaratory and injunctive relief to challenge the constitutionality of certain state tax laws, and to obtain a refund of those taxes. Although unsuccessful at the trial level, the Petitioners prevailed on appeal to the Oklahoma Supreme Court. *Private Truck Council of America, Inc. v. Oklahoma Tax Com'n*, 806 P.2d 598 (Okla. 1990). In that decision, the Oklahoma Supreme Court declared the offending tax statutes unconstitutional because they violated the fundamental requirement of nondiscrimination against interstate commerce. *Id.*; *see also*, 879 P.2d 137, 138 (Okla. 1994), Pet.App. 2a–3a, *same case on remand.* The court further allowed a refund to Petitioners based upon the utilized state-law procedures, in accordance with this Court's decisions in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), and *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). *Private Truck Council*, 879 P.2d at 139, Pet.App. 3a.

However, Petitioners, plaintiffs below, also sought attorney fees: under state law—which was denied—and under 42 U.S.C. § 1988. In its earlier opinion the state supreme court affirmed the dismissal of Petitioners' §§ 1983 and 1988 claim for attorney fees, giving as its reason its conclusion, under then extant law, that a Commerce Clause violation did not support a § 1983 claim. *See, Private Truck*, 879 P.2d at 139; Pet.App. 4a. It is that *reasoning* that was rejected in *Dennis*, not whether Petitioners are entitled to attorney fees.

Commensurate with this Court's remand order, the Oklahoma court asked the parties to brief, and considered, the following question: What is the effect of *Dennis v. Higgins* on Appellants' *coextensive state law claims*,

including Appellants' right to attorney's fees in this case? Pet.App. 60a. [Emphasis added]. After such consideration, and for the reasons given in the opinion below, the court correctly found that *Dennis* has *no* effect; it neither mandates nor authorizes attorney fees in this case.

It is important to note what *Dennis* decided—and what it did not. The *only* question presented or decided in *Dennis* was whether suits for violations of the Commerce Clause may be brought under 42 U.S.C. § 1983. *Dennis*, 498 U.S. at 440. While the Court held that such suits *may* be brought, the Court did not address, and did not decide, whether state courts are *required* to allow such suits, especially where an adequate remedy exists under state law, independent of and coextensive with the remedy provided by § 1983. *State v. Quill Corp.*, 500 N.W. 2d 196 (N.D. 1993), *cert. denied*, 114 S.Ct. 173 (1993).

In *Quill*, which the court below noted was "virtually identical to the case at bar," 879 P.2d at 140, Pet.App. at 6a, the petitioner (Quill) had been successful before this Court in its resistance on Commerce Clause grounds to the State's effort to require the collection of use taxes on interstate mail order sales. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). On remand, Quill sought attorney fees under § 1983 and § 1988 for vindication of its constitutional rights, but acknowledged, as here, that the state statutes provided it full relief from the unconstitutionality of the involved tax acts.

The *Quill* court, applying the reasoning of its earlier opinion in *Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76 (N.D. 1986), observed that the retailer had no cognizable federal civil rights claim under § 1983 to enjoin the collection of the offensive taxes because state law provided a plain, speedy and efficient remedy, and the retailer was thus not entitled to recover attorney fees

under § 1988. Quill's petition for certiorari in that case was denied. 114 S.Ct. 173 (1993).

Petitioners here also rely on *Howlett v. Rose*, 496 U.S. 356 (1990). However, as correctly observed in *State v. Quill* and by the court below, the issue in *Howlett* was entirely different, and directly opposite from the case at bar. In *Howlett*, this Court struck down a Florida decision that purported to extend a state sovereign immunity protection under state common law to an entity (school board) in a manner contrary to and directly at odds with § 1983. In this way, the state court attempted completely to deny the right of action which § 1983 protected. Here, however, the right of action and right to relief are *preserved and recognized under state law*—not defeated. As the court below correctly observed, its decision "is perfectly consistent with the federal interest." 879 P.2d at 141, Pet.App. at 8a.

2. The decision below does not conflict as to any federal question with the applicable decisions of state courts of last resort regarding the question presented, but is consistent with them.

Petitioners here argue that the courts of last resort of the various states are "sharply divided" on this question, and suggest a need for resolution. However, this is not a case of "exhaustion of remedies," nor of jurisdiction to hear § 1983 claims in state court. Nor, of course, is it an attempt to supplant the remedy of § 1983 with state law so as to afford less, constitutionally, than what § 1983 was designed to protect.

To the contrary, where tax challenges are concerned, a majority of state courts have held that where an independent and adequate state remedy exists to redress alleged

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constitutional violations, a § 1983 action or claim may not be maintained. The Supreme Court has not disagreed. As seen in *State v. Quill Corp.*, *supra*, a § 1983 action was not cognizable in state court and taxpayers were not entitled to attorney's fees under § 1988 because a full and adequate remedy was provided by state law. In *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *affirmed by an equally divided court*, 471 U.S. 82 (1985), it was held that a taxpayer may not circumvent state remedies through § 1983. *See also*, *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976) (§ 1983 not available where state law provides adequate remedy); *Davis v. City of Elkhorn*, 393 N.W.2d 95 (Wis. App. 1986) (same); *Johnston v. Gaston County*, 323 S.E.2d 381 (N.C. App. 1984) (same); *Linderkamp v. Bismark School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986) (same); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. banc 1985) (same); *Vann v. DeKalb County Bd. of Tax Assessors*, 367 S.E.2d 43 (Ga. App. 1988) (same); *Ziska v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985) (same).

These cases have followed the reasoning of the federal courts that, because of principles of comity and the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers may not challenge the validity of state tax systems through a § 1983 action in federal court, but "*must seek protection of their federal rights by state remedies*, provided of course that these remedies are plain, adequate, and complete." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) (emphasis supplied). See, *Quill*, 500 N.W.2d at 202.

Although the Tax Injunction Act, by its terms, applies to federal courts and not to state courts, "it nonetheless points the way to the proper standard by which state tax challenges should be measured." *Ziska, supra*, 490 A.2d at

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513. Following that standard, "a majority of states that have considered the issue have held that a claim involving state taxes made pursuant to 42 U.S.C. § 1983 that would be barred in federal court because of the Tax Injunction Act should not be heard in a state court *if an adequate remedy with respect to the matter is otherwise available.*" *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292, 296 (Tenn. 1991) (Emphasis added).[6]

Although not a tax case, Oklahoma has adopted the same rule on similar reasoning—a § 1983 action may not be maintained for the deprivation of a constitutional right if *adequate and meaningful* State grounds for redress exist. *Wilhelm v. Gray*, 766 P.2d 1357, 1359 (Okla. 1988), *cert. denied*, 490 U.S. 1092 (1989). In *Wilhelm*, a man who had been arrested on Christmas Eve and jailed for several days on a recalled bench warrant, brought a § 1983 action against the court clerk for the clerk's allegedly negligent failure to notify the sheriff's office that the warrant had been recalled. The court observed that the Oklahoma Political Subdivision Tort Claims Act, 51 O.S. Supp. 1987, § 151 et seq., was "perfectly suited to providing redress for appellant's grievance," and could "fully compensate the appellant for the loss he has suffered." *Wilhelm*, 766 P.2d at 1360-61. Thus, concluding that "it is irrelevant that the appellant may not recover as much under the State

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[6] Finding the state remedy adequate, the Tennessee Supreme Court declined to recognize § 1983 jurisdiction. 817 S.W.2d, at 297. A year later, in *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992) the court distinguished *L.L. Bean* and concluded that that taxpayer was entitled to utilize § 1983 and § 1988 to avoid the state law limitation on the *amount* of attorney fees to be awarded. This latter decision is correctly characterized by the North Dakota Supreme Court as "inexplicable." *Quill*, 500 N.W.2d at 200 n.2.

remedy as he could through § 1983," *Id.*, at 1359, the court held that "§ 1983 is unavailable as a means of redress for the wrongs alleged in this case." *Id.*, at 1361.[7]

Oklahoma's remedies under OKLA. STAT. tit. 68, § 226 for challenging the constitutionality of state tax systems are "perfectly suited to providing redress" in this case. In its original opinion herein the court characterized § 226 as an "all-in-one legal remedy," authorizing declaratory and injunctive relief, abatement of the challenged taxes, and a refund. 806 P.2d at 606. Likewise, the federal courts have reviewed Oklahoma's remedies, including § 226, and have declared them fully adequate for purposes of 28 U.S.C. § 1341, thereby precluding federal court jurisdiction. *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 587-88 (10th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972 (1981); *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986).

By the reasoning of these decisions it is clear that Petitioners here were not and are not entitled to maintain an action under § 1983 in this case, and are not entitled to attorney fees under § 1988. The majority of state courts that have considered the question do not disagree. *Dennis* does not state or imply to the contrary. As observed in *Quill*, the majority in *Dennis* never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, and there can be no "implied holding" read into *Dennis* that prevents the court from refusing to entertain Petitioners'

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[7] *Wilhelm* is distinguishable from an earlier case, *Wilborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), in which the remedy provided by § 1983 *was* allowed to be maintained where the remedies of the Tort Claims Act were unavailable because barred by the statute of limitations.

§ 1983 claim on these grounds. *Quill*, 500 N.W.2d at 202-203.

Although given and affirmed for a different reason, the dismissal of appellants' § 1983 claim and denial of their request for attorney's fees were correct, and should not be disturbed. *Cf.*, *Atlantic Richfield Co. v. State*, 659 P.2d 930, 934, n.10 (Okla. 1983); *Matter of Estate of Bartlett*, 680 P.2d 369, 374 (Okla. 1984).

As in *Spencer v. South Carolina Tax Comm'n*, *supra*, it is clear that the sole reason Petitioners in this case alleged § 1983 was to justify the allowance of an attorney fee which was not allowable under state law. As the court below said, however, "[n]o case . . . requires an attorneys' fee to be granted to satisfy due process requirements." 879 P.2d at 141 n.3, Pet.App. at 7a n.3. This attempt to circumvent state remedies by invoking § 1983 may not be permitted. *Spencer*, 316 S.E. 2d at 388-89.

CONCLUSION

The decision below is correct, and is not in conflict with the applicable decisions of this Court or those of the state courts of last resort that have addressed the question actually presented. The Petition for a writ of certiorari should be denied.

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APPENDIX

OKLA. STAT. tit. 68, § 226 (1981):

(a) In addition to the right of appeal to the Supreme Court provided for in the preceding section, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling or finding of the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its official depository clearing account or special refund reserve account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together with interest on such amount at the rate of three percent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order. The refunds paid shall be payable as provided in Section 225(d).

(c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act

or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

(d) Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.

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No. 94-688

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OCTOBER TERM, 1994

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Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Respondents' various arguments in opposition to the petition for a writ of certiorari are insubstantial.

1. Respondents try to claim that there is no conflict among lower courts on the question presented by the petition by citing only decisions in accord with the decision below and by simply ignoring the twelve decisions cited at page 12 of the petition that reached the opposite conclusion.[1] Br. in Opp. at 6, 10-14. Only one of those decisions, Bloomingdale's By Mail v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, __ U.S. ___, 113 S.Ct. 3002 (1993), is even mentioned by respon-

[1] Another recent decision recognizing a right of action under § 1983 in state tax cases has come to petitioners' attention since the petition was filed. *Bielski v. Zorn*, 627 N.E.2d 880 (Ind. Tax Ct. 1994).

dents, in a footnote in which respondents implicitly acknowledge the conflict by characterizing the decision of the Supreme Court of Tennessee as "inexplicable.' Br. in Opp. at 12, n. 6. Otherwise, respondents make no attempt to show that the decisions cited by petitioners are not in conflict with the decision of the Oklahoma Supreme Court and with other decisions cited by respondents, evidently hoping that the Court will overlook them.

2. Respondents' argument that the decision below does not conflict with this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991) is astonishing. Respondents state:

> While the Court [in *Dennis*] held that such suits [challenging state taxes under the Commerce Clause] *may* be brought [in state courts under § 1983], the Court did not address, and did not decide, whether state courts are *required* to allow such suits, particularly where an adequate remedy exists under state law, independent of and coextensive with the remedy provided by § 1983.

Br. in Opp. at 9 (emphasis in original). The Court's holding in *Dennis* that persons may bring Commerce Clause challenges to state taxes in state courts under § 1983 would certainly appear to require state courts to allow such suits. If state courts could refuse to allow such suits, it is difficult to see what is left of the Court's holding that persons may bring such suits. In any event, whether the Court's decision in *Dennis* is as limited as respondents claim is itself an important question warranting review.

3. Respondents' argument that the decision below does not conflict with *Howlett v. Rose*, 496 U.S. 356 (1990) is also incorrect. Respondents argue that in *Howlett* Florida courts had applied state law "to completely deny the right of action which § 1983 protected", whereas the courts below have applied state law to uphold petitioners' Commerce Clause claims and to grant them the relief they sought. Br. in Opp. at 10. In fact, as this Court noted (496 U.S. at 360, n. 3), the Florida court decisions

in *Howlett* did not decide whether Howlett had a substantive right to relief under state law for the actions complained of. Indeed, this Court noted that the Florida court in which Howlett had filed suit "exercises jurisdiction over [state law] tort claims by private citizens against state entities (including school boards), of the size and type of petitioner's claim here, and it can enter judgment against them." 496 U.S. at 378. What the Florida court of appeals had held in *Howlett* was that state law barred Howlett's *federal* claim for relief under § 1983, and it was that holding that this Court found to be in error. The holding of the Oklahoma Supreme Court denying petitioner's federal claim for relief under § 1983 is in error for the same reasons.

4. More generally, respondents echo the view of the Oklahoma Supreme Court that it is inappropriate to award relief under § 1983 and attorneys' fees under § 1988 in cases where the substantive relief on the underlying claims was available and awarded under state law. Br. in Opp. at 12-13. This Court has rejected that argument in many cases. As the Court stated in *Monroe v. Pape*, 365 U.S. 167, 183 (1961): "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). Furthermore, the Court has held that if § 1983 would have been an appropriate basis for relief, the plaintiff is entitled to attorneys' fees under § 1988 even if relief was actually awarded on another ground. *Maher v. Gagne*, 448 U.S. 122, 132 n. 15 (1980).

5. There is also no merit to respondents' characterization of an award of attorneys' fees under § 1988 as an "extra windfall" (Br. in Opp. at 6) and their effort to denigrate the importance of the issue by saying that the case is only about attorneys' fees (*id.* at 5). Section 1988 reflects Congress's determination that when a state entity violates a citizen's federal

rights under color of state law and the citizen is required to take legal action to vindicate those rights, the responsible state entity will be liable for the *full* extent of the costs that its actions impose upon the citizen, including the costs of litigation. Recovery of those costs is in no sense a windfall. As this Court has also recognized in many cases, § 1988 represents an important Congressional policy that is " 'an integral part of the remedies necessary to obtain' compliance with § 1983." *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980)(citation omitted).[2]

Furthermore, the decision below presents fundamental questions about the obligations of state courts to enforce federal law that go far beyond the immediate question of attorneys' fees and §§ 1983 and 1988. Whether the court below correctly answered those questions warrants this Court's review.

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[2] In this connection, respondents are mistaken in asserting: "No damages or relief were sought under § 1983, either in the form of declaratory or injunctive relief, or as refunds." Br. in Opp. at 3, n. 3. Count III of petitioners' complaint contained their allegations under § 1983 and expressly stated: "Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. § 1983." Furthermore, the Oklahoma Supreme Court itself recognized in its decision that "plaintiffs sought declaratory and injunctive relief, a refund of taxes paid, and an attorneys' fee, under both state law, and § 1983." Pet App. 5a.

Respondents are also mistaken in asserting that "Petitioners here do not challenge [the] conclusion . . . that Oklahoma law provides an adequate state remedy affording the relief the plaintiffs requested." Br. in Opp. at 4. Petitioners certainly do assert that the state remedies are not adequate, because they do not require the recovery of attorneys' fees and other litigation costs that § 1988 requires.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Oklahoma should be granted.

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JOINT APPENDIX

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125 pp

TABLE OF CONTENTS

Page

Docket Entries 1

District Court for Oklahoma County, No. CJ-OK-84-009902-14 1

Oklahoma Supreme Court, No. CJ849902 10

Petition, Dec. 17, 1984 17

Motion of Odie Nance to Drop Party Defendant for Misjoinder and Motion to Dismiss, Jan. 28, 1985 32

Answer of Oklahoma Tax Commission, Jan. 28, 1985 .. 35

Motion to Dismiss by State of Oklahoma and Leo Winters, Jan. 28, 1985 57

Dismissal Without Prejudice, February 7, 1985 62

Plaintiffs' Memorandum in Opposition to Motions to Drop Defendants and Plaintiff and Motions to Dismiss, March, 1985 65

Order Dismissing Cause as to Individual Parties Defendant, March 29, 1985 74

Motion to Dismiss by Defendants Nance, Wadley and Merrill, April 19, 1985 77

Answer of the Defendants Nance, Wadley, and Merrill, April 19, 1985 81

Plaintiffs' Post Hearing Brief in Opposition to Defendants' Motion to Dismiss, June 24, 1985 83

Supplemental Brief in Support of Defendants' Motion to Dismiss Count III, June 27, 1985 91

Order Granting Judgment to Defendants, March 4, 1987 98

TABLE OF CONTENTS – Continued

Page

Order Certifying the Class, March 6, 1987 101

Order Granting Petition for Writ of Certiorari, Vacating Judgment and Remanding Case to Supreme Court of Oklahoma, June 28, 1991 103

U.S. Supreme Court's Order Remanding Cause to Supreme Court of Oklahoma, July 31, 1991 104

Motion to Remand, July 20, 1992 107

Richard Allen's letter to Clerk requesting expedited consideration, October 8, 1992 117

Richard Allen's letter to Clerk making further request for expedited consideration, December 23, 1993 .. 119

The following opinions, orders, transcripts, and statutes have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Supreme Court of Oklahoma, filed July 19, 1994 ..... 1a

Opinion of the Supreme Court of Oklahoma, dated June 28, 1990, as amended March 5, 1991 ... 24a

Memorandum Opinion of the District Court of Oklahoma County, Oklahoma, filed February 24, 1987 ..... 48a

Order of District Court of Oklahoma County, Oklahoma, Denying Motion for Preliminary Injunction and Alternative Motion for Escrow of Taxes, filed April 1, 1985 ..... 54a

TABLE OF CONTENTS – Continued

Page

Transcript of Proceedings, District Court of Oklahoma County, Oklahoma, dated January 29, 1985 ..... 56a

Relevant Oklahoma Statutes, 47 O.S. Supp. 1986 § 1120(K) and 68 O.S. Supp. 1982 § 607.1 ..... 59a

Order of Supreme Court of Oklahoma, dated February 24, 1994 ..... 60a

CIVIL ACTION DOCKET
CLERK OF COURT

OKLAHOMA COUNTY, OKLAHOMA

JUDGE
HON. JOHN M. AMICK

FILE DATE	CASE-ID
12/17/84	CJ-OK-84-009902-14

CIVIL

PLAINTIFF/ATTORNEY
PRIVATE TRUCK COUNCIL OF AMER ET AL
FRATES, KENT F

DEFENDANT/ATTORNEY
ST OF OK,OK TAX COMM ET AL ET AL
NO ATTORNEY

DATE	*** PROGRESS IN CASE ***
OCT 07 94	BOUND RECORD RETURNED FROM SUPREME COURT
AUG 30 94	R:1597 2091:
AUG 30 94	MANDATE: TRIAL COURT DECISION REINSTATED R: F:
JUL 10 91	BOUND RECORD TRANSMITTED TO SUPREME COURT AS PER ORDER
JUN 26 91	BOUND RECORD RETURNED FROM SUPREME COURT I
APR 03 91	MANDATE:REVERSED AND REMANDED R:1216 F:5392
APR 14 88	BOUND RECORD TRANSMITTED TO SUPREME COURT PER ORD

NOV 17 87	ANSWER BRIEF OF OKLA TAX COMMISS R: F:
OCT 05 87	BRIEF IN CHIEF OF APPELLANTS
AUG 04 87	COURT CLERK'S CERTIFICATE
AUG 04 87	SENT NOTICE OF COMPLETION OF RECORD ON APPEALS
AUG 04 87	BOUND RECORD FOR APPEAL TO THE S.C.
APR 29 87	RESPONSE TO THE ATTY GENERAL TO PETITION IN ERROR & PRELIMINARY STATEMENT
MAR 27 87	RESPONSE TO PETITION IN ERROR & PRELIM STATEMENT
MAR 19 87	DEPOSITION OF: ROGER HURLEY (COPY)
MAR 19 87	TOTAL AMT. RECVD. – CHECK (#008570) WILLIAM B ROGERS R002 30.00
MAR 19 87	DESIGNATION OF RECORD R: F: ACO1 30.00
MAR 12 87	LETTER FILED
MAR 10 87	CERTIFICATE OF APPEAL – S.C. #68,401
MAR 09 87	PETITION IN ERROR AND PRELIMINARY STATEMENT
MAR 06 87	ORDER/MOT TO SETTLE JE /AMICK R:721 F:3841
MAR 04 87	MOTION TO SETTLE JOURNAL ENTRY
MAR 04 87	ORDER GRANTING JUDGMENT TO DEFTS R:720 F:1692

FEB 24 87	MEMORANDUM OPINION
JAN 22 86	REPLY TO SUPPLEMENTAL BRIEF OF OK TAX COMMISSION
JAN 13 86	SUPPLEMENTAL BRIEF OF THE OK TAX COMM IN RESP TO PLTFS' MOT FOR S/J
OCT 28 85	RESP BRIEF OF INTER ASSO MOTOR CARRIERS OF OK INC TO REPLY BR IN SUP OF PL MOT
OCT 28 85	SUPL BRIEF OF THE OKLA ATTY GEN IN OPPO TO PL MOT FOR SUMMARY JUDGMT
OCT 07 85	ORDER (LEAVE TO FILE GRANTD) - AMICK R:614F:2638
OCT 07 85	APP OF ATTY GEN & INTER FOR LEAV TO FILE SUPPLE BR IN OPP TO PL MOT FOR SUM JUDG
SEP 27 85	REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
JUL 12 85	ENT:MOT TO DISM/CONT TO BE RESET IN AUG - AMICK
JUN 27 85	SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS MOT TO DISM COUNT III
JUN 26 85	POST HEARING BRIEF IN OPPOSITION TO DF MOT TO DISM
JUN 21 85	ENT:MOT TO DISM CONT TO 7-12-85 @ 9:00 - AMICK
JUN 17 85	PL MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
JUN 07 85	ENT:MOTION TO DISMISS/CON'T TO 6/21/85 @ 9:00AM - AMICK

MAY 24 85	ENT:MOT TO DISMISS CONT TO 6-7-85 @ 9:00 – AMICK
MAY 10 85	ENT:MOT TO DISMISS/CON'T 5/24/85 @ 9:00AM – AMICK
APR 19 85	ANSWER R:580 F:0431 ODIE A NANCE ETAL
APR 19 85	MOTION TO DISMISS (ODIE A. NANCE ETAL) (AMICK 5/10/85 @ 9:00AM)
APR 01 85	ORD DENYING MOT FOR PRELIMINARY INJUNCTION & MOT FOR ESCROW – MYERS R:575 F:1072
MAR 29 85	ENT:MOT TO CERTIFY & MOT TO DISMISS – SUSTAINED,MOT FOR SUMM JUDG – STRICKEN – AMICK
MAR 28 85	CITATION OF AUTHORITIES IN OPPOSITION TO PLFT MOT TO CERTIFY THE CLASS
MAR 18 85	LETTER FILED/CHRIS NEAVES
MAR 15 85	BRIEF IN OPPOSITION TO PLFT MOT FOR SUMM JUDGMENT
MAR 11 85	RESPONSE OF THE OKLAHOMA TAX COMMISSION TO PLFT MOTION FOR SUMMARY JUDGMENT
MAR 11 85	MEMORANDUM IN RESPONSE TO PLFT MOTION FOR SUMM JUDGMENT
MAR 11 85	MOTION TO SETTLE JOURNAL ENTRY (AMICK 3/29/85 @ 9:00AM)
MAR 11 85	BRIEF OF INTERVENOR IN OPPOSITION TO MOT FOR SUMM JUDGMENT

MAR 08 85	ENT:MOTION FOR SUMM JUDG/CON'T 3/29/85 @ 9:00AM - AMICK
MAR 08 85	PLTF MEMORANDUM IN OPPOSITION TO MOT TO DROP DEFTS & PLTF & MOT TO DISMISS
MAR 07 85	ORDER - AMICK R:569 F:1537
MAR 07 85	ORDER - AMICK R:569 F:1667
MAR 07 85	MOTION FOR ENLARGEMENT OF TIME TO FILE BRIEF
MAR 06 85	AMENDED ANSWER R:569 F:0095
FEB 22 85	ENT:MOT TO INTERVENE/SUSTAINED AS PER JE - AMICK
FEB 19 85	NOTICE OF FILING
FEB 19 85	TRANSCRIPT OF PROCEEDINGS
FEB 15 85	ORDER - AMICK R:564 F:2367
FEB 15 85	ENT:APPL TO W/D/SUST,MOT TO DROP PARTY DEFT/STRICKEN,MOT TO DISM/ STRICKEN - AMICK
FEB 14 85	MEMORANDUM IN SUPPORT OF PLFT MOTION FOR SUMMARY JUDGMENT
FEB 14 85	MOT FOR SUMM JUDG (AMICK - 3/8/85 @ 9:00AM)
FEB 14 85	DISMISSAL W/O PREJUDICE R:564 F:2206 ST OF OK,OK TAX COMM ET AL
FEB 11 85	RESPONSE OF INTERVENOR TO MOT FOR SUMM JUDGMENT
FEB 04 85	MOTION TO INTERVENE (AMICK - 2/22/85 @ 9:00AM)

FEB 04 85	BRIEF IN SUPPORT OF MOTION TO INTERVENE
FEB 04 85	ANSWER R:562 F:0345 INTERVENOR, ASSO MOTOR CARRIER
JAN 29 85	ENT:PL REQUEST FOR TEMP INJ OR IMPOUND OF TAXCOLLECT, DENIED AS PER ORDER – MYERS
JAN 29 85	APPL TO WITHDRAW AS ATTY OF RECORD (AMICK 2/15/85 @ 9:00AM)
JAN 29 85	RESPONSE OF OKLAHOMA TAX COMMISSION TO PLFT MOT FOR PRELIMINARY INJ
JAN 28 85	ANSWER R:566 F:1111 ST OF OK,OK TAX COMM ET AL
JAN 28 85	MOTION TO DROP PARTY DEFT FOR MISJOINDER & MOT TO DISMISS – 2/15/85 @ 9:00AM – AMICK
JAN 28 85	MOTION TO DROP PARTY DEFT FOR MISJOINDER & MOT TO DISMISS – AMICK – 2/15/85 @ 9:00AM
JAN 28 85	MOTION TO DROP PARTY DEFT FOR MISJOINDER & MOTION TO DISM – AMICK – 2/15/85@ 9:00AM
JAN 28 85	MOTION TO DROP PARTY DEFT FOR MISJOINDER & MOT TO DISMISS – AMICK – 2/15/85 @ 9:00AM
JAN 28 85	BRIEF IN SUPPORT OF STATE OF OKLA
JAN 28 85	MOTION TO DISMISS (AMICK – 2/15/85 @ 9:00AM)
JAN 28 85	BRIEF OF DEFT STATE OF OKLAHOMA

JAN 24 85	MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO CERTIFY THE CLASS
JAN 24 85	MOTION TO CERTIFY THE CLASS (AMICK – 2/15/85 @ 1:30 PM)
JAN 22 85	PRELIMINARY INJUNCTION R:559 F:0155
JAN 22 85	ORDER FOR ESCROW OF FUNDS – (NOT SIGNED) R:559 – 0148
JAN 22 85	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
JAN 16 85	ENT:HEARING CON'T TO 1/29/85 @ 2:00PM – MYERS
JAN 14 85	ENT:HEARING SET 1/16/85 IS CON'T TO 1/29/85 @ 2:00 PM – MYERS
JAN 07 85	ENT:HEARING SET 1/16/85 IS CON'T TO 1/29/85 @ 2:00 PM – MYERS
JAN 04 85	ORDER – AMICK R:555 F:0462
JAN 04 85	ORDER ENLARGEMENT TIME TO PLEAD OR ANSWER – AMICK R:555 F:461
JAN 04 85	APPLICATION FOR ENLARGEMENT OF TIME TO PLEAD OR ANSWER
JAN 04 85	MOTION FOR ENLARGEMENT OF TIME
DEC 27 84	ORDER & NOTICE – GRAY R:553 F:1541
DEC 27 84	MOT FOR PRELIMINARY INJUNC OR IN THE ALTER TO REQUIRE PLACE OF TAX (SPEC SET)

DEC 27 84	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION	
DEC 27 84	AFFIDAVIT OF ROGER HURLEY	
DEC 27 84	AFFIDAVIT OF FREIDA GRIFFIS	
DEC 20 84	SUM/SVD/OKLA TAX COMM BY SVD ODIE NANCE ON 12–17-84 R:553 F:909	
DEC 20 84	SUM/SVD/ODIE A NANCE IN PRS 12-17-84 R:553 F:907	
DEC 20 84	SUM/SVD/GEORGE NIGH BY SVD BRENDA COLLINSON ON 12-17-84 R:553 F:905	
DEC 20 84	SUM/SVD/LEO WINTERS BY SVD C.O.SAGE ON 12-17-84 R:553 F:903	
DEC 20 84	SUM/SVD/ROBERT L WADLEY IN PRS 12-17-84 R:553 F:901	
DEC 20 84	SUM/SVD/J.L. MERRILL IN PRS 12-17-84 R:553 F:899	
DEC 17 84	TOTAL AMT. RECVD. – CHECK (# 006185)	
	R002	74.00
DEC 17 84	RETURN OF SERVICE CHARGE	
	AC12	4.00
DEC 17 84	SUMMONS ISSUED – PPS	
DEC 17 84	RETURN OF SERVICE CHARGE	
	AC12	4.00
DEC 17 84	SUMMONS ISSUED – PPS	
DEC 17 84	RETURN OF SERVICE CHARGE	
	AC12	4.00
DEC 17 84	SUMMONS ISSUED – PPS	

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DEC 17 84	SUMMONS ISSUED - PPS		
DEC 17 84	RETURN OF SERVICE CHARGE		
		AC12	4.00
DEC 17 84	SUMMONS ISSUED - PPS		
DEC 17 84	RETURN OF SERVICE CHARGE		
		AC12	4.00
DEC 17 84	SUMMONS ISSUED - PPS		
DEC 17 84	LAW LIBRARY FEE		
		AC03	3.50
DEC 17 84	COURT DOCKET FEE		
		AC02	3.00
DEC 17 84	PETITION		
		AC01	43.50

	BALANCE DUE:		.00

DATE: 1/30/95

OKLAHOMA APPELLATE COURTS
DOCKET FOR APPEAL CV68401
AS OF 02/01/95

COUNTY OKLAHOMA CASE NUMBER CJ49902
TRIAL COURT: DISTRICT
TYPE: DC TRIAL COURT JUDGE: JOHN AMICK

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DOCKET INFORMATION

TOP OF DOCKET

02-06-87 DATE OF ORDER APPEALED

03-09-87 CK REC'D FROM WILLIAM B ROGERS & ASSOC $100

03-09-87 CERTIFICATE OF APPEAL ISSUED

03-09-87 PETITION IN ERROR

03-09-87 APPELLANT AGREEABLE TO SETTLEMENT CONFERENCE

03-09-87 MOTION TO RETAIN

03-27-87 RESPONSE TO PETITION (ASSOC. MOTOR CARRIERS OKAL, INC)

03-27-87 APPELLEE AGREEABLE TO SETTLEMENT CONFERENCE

03-30-87 RESPONSE TO PETITION (OKLA. TAX COMM.)

04-09-87 APPLICATION OF OKLA. A.G. TO FILE RESP TO PETF OUT OF TIME

04-10-87 JE: ATTY GEN TO 4-29-87 TO FILE RESP TO PET.; N/ATTYS.

04-29-87 RESPONSE TO PETITION

08-05-87 NOTICE OF COMPLETION

10-05-87 BRIEF IN CHIEF OF APPELLANTS

11-16-87 ANSWER BRIEF OF OKLA TAX COMM

11-16-87 BRIEF IN CHIEF OF INTERVENOR

11-16-87 APPLIC OF AG FOR EXT OF TIME TO FILE BRIEF

11-17-87 JE: ORDER, DOOLIN, CJ-APLEE, OKLA. AG, GRANTED TO 12/7/87 TO FILE BRIEF. TIME FOR ATRB WILL COMMENCE RUNNING ON FILING OF OKLA AG'S BRIEF. N/ATTYS

12-04-87 ANSWER BRIEF OF THE OKALHOMA [sic] A.G.

12-23-87 APPLICATION OF APPELLANT PRIVATE TRUCK FOR EXT OF TIME TO FILE ATRB

01-11-88 REPLY BRIEF OF APLNTS

04-11-88 RECORD ORDERED FROM DISTRICT COURT.

05-16-88 RECORD ORDERED FROM DISTRICT COURT.

05-26-88 ORIG. RECORD OF 504 PGS, TRANS. 1-29-85 OF 5 PGS.

06-10-88 LETTER FROM APLNT'S ATTY, WM ROGERS W/ATTCHD U.S.S.C DECISN

06-15-88 CAUSE SUBMITTED TO COURT (BR)

08-19-88 LETTER FROM WM. ROGERS RE: NEW JERSEY APPELLATE DIVISION W/ATTCHD PLEADING

08-26-88 JE: APLNTS' & APLEES' MOTIONS TO RETAIN GRANTED. N/ATTYS

01-26-90 APLEE'S SUGGESTION OF ADD'L CASE AUTHORITY

02-05-90 PLAINTIFFS' (APP'TS') RESPONSE TO SUGGESTION

06-28-90 JE: OPIN REVERSED & REMANDED DOOLIN, J CONCUR: HARGRAVE, CJ, SIMMS, DOOLIN, KAUGER, SUMMERS, JJ CONCUR I/RESULT: LAVENDER, J CONCUR I/PRT; DISSENT I/PRT: OPALA, VCJ DISSENT: HODGES, J C/ATTYS LISTED - HON. J. AMICK - OBJ - WEST - CCH - MDC - PRESS

06-28-90 REVERSED AND REMANDED; OPINION

07-18-90 APLEE'S APPL FOR EXTN OF TIME TO FILE PET FOR REHRG

07-20-90 JE: ON JOINT APPL APLEES OKLA TAX COMM & A.G. GRANTED TO 8-8-90 TO FILE FOR REHRG & BFSP. C/ATTYS

08-08-90 APLEE'S PETITION FOR REHRG & BRIEF IN SUPPORT

08-08-90 APPELLEE'S PETITION FOR REHEARING & BFSP (TAX COMM)

09-06-90 APLNT'S BRIEF IN OPPOSITION TO PET FOR REHRG

09-25-90 JE: ORDER OPIN OF 6-28-90 AMENDED AS FOLLOWS, ETC. IN ALL OTHER RESPECTS OPIN OF 6-28-90 SH/REMAIN UNAFFECTED BY THIS ORDER, CONCUR: HARGRAVE, CJ, SIMMS, DOOLIN, KAUGER, SUMMERS, JJ CONCUR I/PRT; DISSENT I/PRT: OPALA, VCJ, LAVENDER, J C/SAME AS OPIN

09-27-90 JE: CORRECTED ORDER GRANTING REHEARING FOR LIMITED PURPOSE OF

AMENDING TYPED OPINION OF 6-28-90, ETC.; IN ALL OTHER RESPECTS OPINION SHALL REMAIN UNEFFECTED [sic] BY THIS ORDER, HARGRAVE, CJ, SIMMS, DOOLIN, KAUGER & SUMMERS, JJ, CONCUR, OPALA, VCJ, & LAVENDER, J, CONCUR IN PART & DISSENT IN PART; COPIES AS OPINION.

10-17-90 JOINT APPL FOR EXTN OF TIME TO FILE PET FOR REHRG

10-24-90 JOINT PETITION FOR REHEARING OR CLARIFICATION

03-05-91 JE: ORDER OF CLARIFICATION, OPALA, CJ: CORRECTION ORDERS OF 9-25 & 27-90 W/DRAWN; OPINION CORRECTED, ETC; OPALA, CJ HODGES, VCJ, LAVENDER, SIMMS, DOOLIN, HARGRAVE, WILSON & SUMMERS, JJ, CONCUR; COPIES TO ATTYS, OBJ, WEST, MDC, BNA, CCH.

03-28-91 MANDATE ISSUED

04-05-91 RECEIPT FOR MANDATE

04-22-91 NOTICE FROM U.S.S.C ON FILING OF PET FOR CERT

05-16-91 RECORD RECEIVED FROM COURT.

05-20-91 RECORD RETURNED TO DISTRICT COURT

07-02-91 LETTER FROM U.S.S.C. JE: PET FOR CERT GRANTED. THE JUDGMENT IS VACATED & CASE IS REMANDED TO S.C. OF OKLA.

07-03-91 JE: ORDER, OPALA, CJ: CT. CLERK TO FORWARD RECORD, ETC.; C/ATTYS & CT. CLERK OKLA. CO.

07-10-91 ORIG. RECORD OF 503 PGS, TRANS. 1-29-85 OF 5 PGS, DEPO. OF ROGER HURLEY.

07-15-91 CAUSE SUBMITTED TO COURT 676

08-05-91 LETTER FROM U.S.S.C. W/ATTCHD CERT MANDATE & OPINION

07-20-92 MOTION TO REMAND

10-14-92 LETTER FROM R.ALLEN, APLNT'S ATTY RE: REMAND REQUESTED

12-27-93 LETTER FROM R.ALLEN, APLNT'S ATTY

02-24-94 JE: PARTIES DIRECTED TO FILE SIMULTANEOUS BRFS NLT 3-11-94 ON THE FOLLOWING ISSUES; SEE ORDER TH/DATE, CONSIDERATION OF APLNTS' MOT TO REMAND IS DEFERRED UNTIL RESOLUTION OF FOREGOING ISSUES. ALL JUSTICES CONCUR. C/ATTYS

03-11-94 APLNTS' BRIEF ON THE ISSUES PRESENTED REGARDING ATTYS' FEE

03-11-94 BRIEF FOR OKLA. TAX COMMISSION

03-31-94 APLNT'S REPLY BRIEF

07-19-94 JE: OPINION JUDGMT REINSTATED PER CURIUM CONCUR: HODGES, CJ, LAVENDER, VCJ, SIMMS, HARGRAVE, WATT, JJ. CONCUR N/PRT DISSENT N/PRT: KAUGER, SUMMERS, JJ. DISSENT: OPALA, WILSON, JJ COPIES TO ATTYS LISTED D.C. JUDGE PRESS, MDC, OBJ, CCH, WEST, SHEPARD

*****TYPE MANDATE*****

07-19-94 JE: WILSON, J., W/WHOM OPALA, J., JOINS DISSENTING ETC., C/SAME AS OPIN

07-22-94 LETTER FROM S. JOHNSTON RE: TYPO I/OPIN

08-19-94	MANDATE ISSUED
08-31-94	RECEIPT FOR MANDATE
09-09-94	RECORD RECEIVED FROM COURT.
10-04-94	RECORD RETURNED TO DISTRICT COURT
10-11-94	NOTICE OF ADDRESS CHANGE (OF WM B. ROGERS)
10-24-94	NOTICE OF FILING PETITION FOR CERTIORARI W/U.S.S.C.
10-26-94	CORRECTED NOTICE OF ADDRESS CHANGE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

On behalf of themselves and All Others Similarly Situated,

Plaintiffs,

v.

STATE OF OKLAHOMA, OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Individually and as Chairman, Oklahoma Tax Commission, ROBERT L. WADLEY, Individually and as Vice-Chairman, Oklahoma Tax Commission, J. L. MERRILL, Individually and as Secretary-Member, Oklahoma Tax Commission, and LEO WINTERS, Individually and as State Treasurer of Oklahoma,

Defendants.

No. CJ-84-9902

PETITION

1. In this class action, plaintiffs seek declaratory and injunctive relief and refunds of unlawfully exacted fees and taxes on behalf of themselves and all others similarly situated. Plaintiffs challenge the lawfulness of

68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp. 1983) §22.5j(K), under which the defendant Oklahoma Tax Commission ("Commission") has imposed "retaliatory" taxes and fees on motor carriers whose vehicles are registered in other states. Because these taxes and fees are not imposed on motor carriers whose vehicles are registered in Oklahoma, plaintiffs contend that they discriminate against interstate commerce and otherwise violate plaintiffs' rights under the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2, Clause 1, of the United states Constitution; and Section 1983 of Title 42 of the U.S. Code.

PARTIES

2. Plaintiff Private Truck Council of America, Inc. (PTCA), is a nonprofit business association incorporated under the laws of New York State. It has its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies presently operating trucks and related equipment as a private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. A large number of PTCA's member companies, operating thousands of vehicles in interstate commerce through the state of Oklahoma, register their vehicles in states against which Oklahoma retaliates under the authority contained in Sections 607.1 and 22.5j. As such, these companies have been or will be required to pay the retaliatory taxes and fees imposed by the Oklahoma Tax Commission.

3. Plaintiff Circle W. Transportation, Inc., a wholly-owned subsidiary of Westinghouse Electric Corporation is a Delaware corporation with its principal place of business in North Huntingdon Pennsylvania. It operates numerous vehicles, all of which are authorized to operate in the State of Oklahoma. Fifteen of those vehicles are registered in Pennsylvania and are therefore subject to the retaliatory taxes and fees imposed under Sections 607.1 and 22.5j.

4. Plaintiff Roy E. Griffis is an unincorporated motor carrier whose principal place of business is in Bearden, Arkansas. Griffis operates one vehicle, which is duly authorized to operate in the State of Oklahoma. Those vehicles are registered in Arkansas and are therefore subject to the retaliatory taxes and fees imposed under Sections 607.1 and 22.5j.

5. Defendant Oklahoma Tax Commission (hereinafter "Commission") is the State agency which has authority, pursuant to 68 O.S. (1983 Supp.) §607.1(B) and 47 O.S. (1983 Supp.) §22.5j(K), to adopt rules and regulations implementing the retaliatory taxes and fees authorized in Sections 607.1 and 22.5j. The Commission is also the state agency which assesses, collects, and enforces those retaliatory taxes and fees.

6. Defendants Odie A. Nance, Robert L. Wadley, and J. L. Merrill are, respectively, the Chairman, Vice Chairman, and Secretary-Member of defendant Oklahoma Tax Commission.

7. Defendant Leo Winters is the State Treasurer of Oklahoma. The State Treasurer administers the State Highway Construction and Maintenance Fund and the

Oklahoma Tax Commission Fund, in which much of the proceeds of the retaliatory taxes and fees imposed under Sections 607.1 and 22.5j are deposited.

THE CLASS

8. Pursuant to 12 O.S. (1984 Supp.) §2023 of the Oklahoma Statutes, plaintiffs bring this action on behalf of themselves and all other nonresident motor carriers operating through the State of Oklahoma whose vehicles are registered in states against which Oklahoma retaliates pursuant to Sections 607.1 and 22.5j, and which have therefore paid or will pay the retaliatory taxes and fees imposed under those sections. The parties comprising the plaintiff class include hundreds of interstate motor carriers and thus are so numerous as to make joinder impracticable. The claims of law and fact are common to all members of the class and the plaintiffs will fairly and adequately represent the interests of all class members. Moreover, a class action is superior to other available methods of adjudicating the controversy.

JURISDICTION

9. This Court has jurisdiction over this action under 68 O.S. 1981 §226(c) and 12 O.S. 1981 §§1651 *et seq.*

FACTS

10. The State of Oklahoma imposes several taxes and fees on motor carriers which operate within the State of Oklahoma. Most of those are paid by all motor carriers which use the State's roads, regardless of their state of

registration. For example, Oklahoma imposes a fee for the registration of all trucks and related equipment which operate in Oklahoma. 47 O.S. 1981 §22.5a *et seq.* Oklahoma also imposes a tax on the consumption of motor fuel within the State. 68 O.S. 1981 §501 *et seq.* This tax is based on the percentage of a carrier's mileage in Oklahoma and the amount of fuel consumed within the State. The fuel tax is paid by all motor carriers, including Oklahoma-based carriers, regardless of their state of registration.

11. In addition to these taxes, effective July 1, 1982 the Oklahoma Legislature amended the Oklahoma motor fuel tax code by adding a new tax solely on nonresident motor carriers as follows:

> In addition to those taxes or fees imposed by Articles 5, 6 and 7 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, exercise, sales, use or mileage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

68 O.S. (Supp. 1983) §607.1(A).

12. Virtually identical language providing for an identical tax was added to the registration and licensing code shortly thereafter:

> In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fees may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sales, use or mileage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

47 O.S. (1983 Supp.) §22.5j(K).

13. These statutes authorize the Oklahoma Tax Commission to monitor the taxes and fees imposed on Oklahoma carriers by other states and to adopt rules and regulations implementing retaliatory taxes and fees against other states as it sees fit. The statutes further provide that the proceeds of the retaliatory taxes and fees collected under Section 607.1 shall be divided between the Oklahoma Tax Commission Fund, the State Highway Construction and Maintenance Fund, and the various counties of the State, in the manner described in 68 O.S. (1983 Supp.) §602.1. They further provide that the proceeds of retaliatory taxes collected under Section 22.5j shall be divided between the Oklahoma Tax Commission Fund, the various counties of the State, the County Road Fund, and the cities and incorporated towns of the State, in the manner described in 47 O.S. (1983 Supp.) §22.2A.

14. Beginning in 1983, the Oklahoma Tax Commission implemented sections 607.1 and 22.5j by requiring

non-resident motor carriers from 24 states to pay retaliatory taxes and fees, which it denominated "reciprocity fees", and to obtain a "reciprocity certificate" from the Motor Fuel Division of the Tax Commission. Effective January 1, 1985, the Commission has added one additional state whose carriers must pay these retaliatory fees. These fees take the form of annual "fuel marker fees", imposed on vehicles registered in 19 states, which vary from $1.00 to $50.00 depending on the state in which the vehicle is registered; an annual mileage use tax of $175.00 on vehicles of over 73,280 pounds registered in one state, Arkansas; an annual axle tax of $36.00 per axle on vehicles registered in one state, Pennsylvania; and "trip fees" ranging from one to eight cents per mile operated in Oklahoma on vehicles registered in eight states. See Exhibit A.

15. Motor carriers whose vehicles are registered in the State of Oklahoma pay no fees or taxes pursuant to Sections 607.1 and 22.5a for their use of the State roads.

16. Plaintiff Circle W Transportation, Inc. paid the State of Oklahoma an annual axle tax of $1,080 for th [sic] year 1984 with respect to its vehicles registered in Pennsylvania that operated in Oklahoma in 1984. Plaintiff Roy E. Griffis, whose vehicle is registered in Arkansas, paid an annual mileage use tax of $175 and an annual fuel market fee of $10 in 1984.

17. Plaintiffs Circle W Transportation, Inc. and Roy E. Griffis have given notice to the tax Commission of their intent to file suit for the recovery of such tax pursuant to 68 O.S. 1981 §226(b) Exhibit B).

COUNT I

Unlawful Burden On Interstate Commerce

18. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 17 as if fully set forth herein.

19. The retaliatory taxes and fees imposed on plaintiffs and the plaintiff class pursuant to Sections 607.1 and 22.5j constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers registered outside the State of Oklahoma, while no comparable tax or fee is imposed on carriers registered in the State of Oklahoma. As such, the state by its taxing scheme favors domestic enterprises over enterprises from other states. Oklahoma's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of vehicle registration. On its face, therefore, the tax discriminates against interstate commerce. Moreover, the amount of the tax does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

20. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 17 as if fully set forth herein.

21. The retaliatory taxes imposed pursuant to Sections 607.1 and 22.5j constitute a denial of the privileges and immunities of plaintiffs and the plaintiff class, whose vehicles are registered outside the State of Oklahoma, because it imposes a tax on them solely because of their residence in another state. No comparable tax is imposed on residents of Oklahoma. Accordingly, these taxes discriminate against non-residents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1.

COUNT III

42 U.S.C. §1983

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 17 as if fully set forth herein.

23. The actions of defendants set forth in Counts I and II above have been and will continue to be taken under color of state law, custom and usage and threaten to deprive plaintiffs of rights secured to them by the United States Constitution. Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. §1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant them:

(a) A declaratory judgment pursuant to 12 O.S. 1981 §1651 declaring that the retaliatory taxes imposed pursuant to 68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp.

1983) §22.5j(K) violate the United States Constitution and other federal law and are therefore null and void;

(b) A permanent injunction enjoining the defendant Oklahoma Tax Commission from assessing or collecting retaliatory taxes and fees on non-resident motor carriers under 68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp. 1983) §22.5j(K);

(c) Refunds of all retaliatory taxes and fees collected by the Oklahoma Tax Commission pursuant to 68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp. 1983) §22.5j(K) prior to the effectiveness of this Court's judgment, with interest;

(d) Attorneys' fees as provided under 12 O.S. 1981 §18(C) and 42 U.S.C. §1988, and costs of this action; and

(e) Such other and further relief as this Court may deem just.

OF COUNSEL:

BILLIG, SHER & JONES, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C. 20006

/s/ Richard A. Allen
Jacob P. Billig
Richard A. Allen
David F. Smith
Billig, Sher
& Jones, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C.
20006
(202) 429-9090

/s/ _____
Kent F. Frates
Colcord Building
Suite 600
15 North Robinson
Oklahoma City,
Oklahoma 73102
(405) 272-0616
Attorneys for Plaintiffs

Dated: December 17, 1984

ODIE A. NANCE, Chairman
ROBERT L. WADLEY, Vice Chairman
J. L. MERRILL, Sec'y-Member

	Due 1/1/84 Annual Fuel Marker Fee
Alabama	$12.00
Arizona	
Arkansas	$10.00
Connecticut	$10.00
Delaware	$10.00
Florida	$ 8.00
Georgia	$ 3.00
Idaho	$ 1.00
Kentucky	$10.00
Maine	$15.00
Maryland	$25.00
Massachusetts	$14.00
Mississippi	$12.00
New Hampshire	$10.00
New Jersey	$ ~~6.00~~
New Mexico	$ 2.00
New York	
North Caroline	$10.00
Nevada	
Ohio	
Oregon	
Pennsylvania	$ 5.00
Vermont	$50.00
West Virginia	$10.00
Louisiana	$12.00

States that Oklahoma has imposed a similar tax.

EXHIBIT A [LOGO]

KLAHOMA TAX COMMISSION
STATE OF OKLAHOMA
2501 LINCOLN BLVD.
AHOMA CITY, OKLAHOMA 73194

DIVISION

	Annual Mileage Use Tax	Annual Axle Tax	Trip Fee
	Due 7/1/84 $175.00/Reg. over 73,280#		8¢ mile
			4 1/2¢/mile
	60,000# or over		3¢/mile
9/1/84			
			3¢/mile
	(Household Movers Exempt)		4¢/mile
			2 1/4¢/mile
	(Truck 3 or more axles		1¢/mile
	(Tractor Semitrailer Comb. 3 axles		1¢/mile
ly	(Tractor Semitrailer Comb. 4 axles		1 1/2¢/mile
	(Tractor Semitrailer Comb. 5 axles		2¢/mile
	(Truck-Trailer Comb. 4 or more axles		2 1/2¢/mile
		(Due 4/1/84	8¢/mile
	----------	($36.00 per axle	
		(PA only	

./85

EXHIBIT B

LAW OFFICES
BILLIG, SHER & JONES, P.C.
SUITE 300
2033 K STREET, N.W.
WASHINGTON, D.C. 20006

RICHARD A. ALLEN
JOHN R. ATTANASIO
JACOB P. BILLIG
JOHN A. DeVIERNO
MARC J. FINK
TERRENCE D. JONES
KELLY A. KNIGHT
JEFFREY F. LAWRENCE
WARRANT L. LEWIS
MICHAEL G. ROBERTS
STANLEY O. SHER
DAVID F. SMITH
JULIAN H. SPIRER

TEL. (202) 429-9090
CABLE: BISJO
TELEX: 89-569

December 14, 1984

Mr. Odie Nance
Chairman
Oklahoma Tax Commission
2501 Lincoln Blvd.
Oklahoma Way, Oklahoma 73105

Re: Notice of Intent to File Suit To Challenge the Constitutionality of Retaliatory Taxes Paid Pursuant to 68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp. 1983) §22.5j(K)

Dear Mr. Nance:

On behalf of our clients the Private Truck Council of America, Inc., Circle W. Transportation, Inc. and Roy E. Griffis and all other similarly situated motor carriers that are subject to the retaliatory taxes imposed by 68 O.S. (Supp. 1983) §607.1 and 47 O.S. (Supp. 1983) §22.5j(K), I hereby give notice pursuant to 68 O.S. (1981) §226(b) of their intent to file suit to recover taxes paid, to seek a declaratory judgment that such taxes are unconstitutional because they violate the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution and that they violate 42 U.S.C. § 1983, and to seek a permanent injunction against the assessment, collection and enforcement of such taxes.

Private Truck Council of America, Inc., (PTCA) is a nonprofit business association incorporated under the laws of New York State. It has its principal place of business in Washington D.C. PTCA is comprised of over 1,800 companies presently operating trucks and related equipment as private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. A large number of PTCA's member companies, operating thousands of vehicles in interstate commerce through the state of Oklahoma, register their vehicles in states against which Oklahoma retaliates under the authority contained in Sections 607.1 and 22.5j. As such, these companies have been or will be required to pay the retaliatory taxes and fees imposed by the Oklahoma Tax Commission.

Circle W. Transportation, Inc., a wholly owned subsidiary of Westinghouse Electric Corporation, is a Delaware corporation with its principal place of business in Norht [sic] Huntington, Pennsylvania. It operates 15 vehicles that are registered in Pennsylvania and many of which have operated and will continue to operate in the State of Oklahoma. It paid retaliatory taxes to the State of Oklahoma for the year 1984 pursuant to 68 O.S. (Supp. 1983) § 607.1(A) and 47 O.S. (1983 Supp.) §22.5j(k) and regulations implemented by the Oklahoma Tax Commission in the amount of $1,080.

Roy E. Griffis is an incorporated motor carrier whose principal place of business is in Beardon, Arkansa. [sic] Griffis has one vehicle which is registered in Arkansas and which he has operated and will continue to operate in Oklahoma. Mr. Griffis paid retaliatory taxes and fees to the State of Oklahoma in the amount of $185 on September 25, 1984.

This notice of intent to file suit is filed on behalf of the foregoing and all other motor carriers whose vehicles are registered in states against whom Oklahoma retaliates and which have paid or will be subject to retaliatory taxes imposed by Oklahoma.

Sincerely,

/s/ Richard A. Allen
Richard A. Allen
Attorney for the Private Truck
Council of America, Inc.,
Circle W. Transportation, Inc.
and Roy E. Griffis

RAA/tpr

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA INC., et al.,	)	
Plaintiffs,	)	No. CJ-84-9902
v.	)	
STATE OF OKLAHOMA, et al.,	)	
Defendants.	)	

MOTION TO DROP PARTY DEFENDANT FOR MISJOINDER AND MOTION TO DISMISS

ODIE A. NANCE, a named defendant in the above titled action, moves the Court to enter an Order herein, pursuant to 12 O.S. Supp. 1984, §2021, dropping said party as a defendant herein, both in his official capacity and as an individual, for the following reasons:

1. This action is brought pursuant to 68 O.S.1981, §226, to recover certain taxes paid under protest, and for injunctive and declaratory relief.

2. The Oklahoma Tax Commission, a named defendant herein, is the sole, necessary and proper party defendant herein. (68 O.S.1981, §226[c])

3. Said Odie A. Nance, as Chairman of the Oklahoma Tax Commission, has no interest in the subject matter or the outcome of this action, other than as provided by statute.

4. The petition filed herein contains no allegations of malice, oppression, or willful misconduct on the part of this defendant; and totally fails to make any allegation

sufficient to subject this defendant to personal liability in the premises.

5. As to this defendant, the petition fails to state a claim upon which relief can be granted.

6. The petition, taken as a whole, totally fails to assert, as against this defendant, any right to relief whatsoever.

WHEREFORE, this defendant has been improperly joined as a party defendant herein; and an Order should be entered dropping said defendant as a party herein, and dismissing this action as to said defendant, both in his official capacity and as an individual.

/s/ Stanley Johnston
J. LAWRENCE BLANKENSHIP,
General Counsel, Oklahoma
Tax Commission
DONNA E. COX, Attorney
STANLEY JOHNSTON, Attorney
2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141

Attorneys for Odie A. Nance,
Individually and as Chairman
of the Oklahoma Tax Commission

CITATION OF AUTHORITIES:

68 O.S.1981, §226;
68 O.S. Supp. 1984, §§2012, 2020(2), 2021;
Atlantic Oil Producing Co. v. Sneed, 176 Okl. 303, 54 P.2d 149 (1936); *Mills v. Smith*, 355 P.2d 1064, 82 ALR 2d 1144 (Okl. 1960); *Neal v. Donahue*, 611 P.2d 1125 (Okl. 1980); *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071 (7th Cir. 1978).

NOTICE OF MOTION

TO: Jacob P. Billig
Richard A. Allen
David F. Smith
Billig, Sher & Jones, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C. 20006
Attorneys for Plaintiffs

William B. Rogers
6440 Avondale Drive
Suite 200
Oklahoma City, OK 73116
Attorney for Plaintiffs

Thomas L. Spencer
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73105
Attorney for State of Oklahoma and Leo Winters, State Treasurer

Please take notice that the foregoing motion will be presented for hearing before the Honorable John Amick in his courtroom at the Oklahoma County Courthouse, City of Oklahoma City, on the 15th day of February, 1985, at 9:00 o'clock A.m., or as soon thereafter as counsel may be heard.

/s/ Stanley Johnston
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January, 1985, a true and correct copy of the foregoing Motion and Notice of Motion was mailed to the persons named in said Notice, at the addresses therein shown.

/s/ Stanley Johnston

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA INC., et al.,	)	
Plaintiffs,	)	No. CJ-84-9902
v.	)	
STATE OF OKLAHOMA, et al.,	)	
Defendants.	)	

ANSWER OF OKLAHOMA TAX COMMISSION

[Filed 1/28/85]

1. Defendant denies the alleged unconstitutionality of 68 O.S. Supp. 1982, §607.1, and 47 O.S. Supp. 1982, §22.5j(K); and further denies that the plaintiffs' rights have been violated by either the imposition or the application of the taxes and fees provided therein.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 2, 3 and 4 of plaintiffs' petition.

3. Defendant admits the averments contained in paragraphs 5, 6 and 7 of said petition, insofar as the averments contained therein comport to the capacity and the authority of the defendant to administer the tax laws of the State of Oklahoma, as provided by the statutes and Constitution of this State.

4. Defendant denies that this action is maintainable as a class action as alleged in paragraph 8 of said petition; and requests that plaintiffs be required, upon full hearing pursuant to notice, to show that all of the prerequisites to a class action, as provided by statute, are met herein.

5. As to the remaining numbered paragraphs of plaintiffs' petition, defendant states:

FIRST DEFENSE

6. There are essentially three tiers or structures of tax applied by the states to the operation by motor carriers of motor vehicles within, and for the use of highways within the states' borders. The first two, applied by essentially all states, are: (a) vehicle licensing and registration, and; (b) motor fuel taxes. These two tiers of taxes are, in those states which are members of the International Registration Plan (I.R.P.), apportioned or prorated for registered motor carriers according to the percentage of the carrier's total annual miles driven within the state. Oklahoma, Arkansas and Pennsylvania are each members of the I.R.P.; and each state imposes both of these forms of tax, and apportions and prorates the taxes according to the reciprocal policies of the I.R.P.

7. In addition, there is a third tier or structure of tax enacted by some of the states, which is not apportioned or prorated; and which may take the form of fuel marker fees, mileage or highway use tax, weight-distance tax, axle tax or fees, trip fees, etc. The State of Arkansas imposes such a third-tier, non-apportioned tax, denominated the Highway Use Equalization Tax, which is codified in §75-817.3, Arkansas Statutes, a copy of which is attached as "Exhibit A" hereto and made a part hereof. Under the provisions of said statute, non-resident motor carriers operating in the State of Arkansas must pay a nonapportionable, flat fee of $175.00 per year; while resident motor carriers, if not otherwise exempt or excluded

by statute, may pay either said flat fee or a lesser amount, at the resident motor carrier's option, computed on such resident motor carrier's mileage driven within the State of Arkansas. Similarly, the State of Pennsylvania has enacted a third-structure tax, denominated an Axle Tax, and codified in 75 Pa.C.S.A., §9901, et seq., a copy of which is attached hereto as "Exhibit B" and made a part hereof. By the provisions of the Pennsylvania axle tax, motor carriers, including carriers base-registered in the State of Oklahoma operating in Pennsylvania, must pay a tax of $36.00 per axle per year.

8. The imposition of such third-structure taxes upon Oklahoma resident operators of such vehicles constitutes a barrier to the conducting of interstate business by such Oklahoma residents, not encountered in other states where, by reciprocal agreement or otherwise, such third-structure taxes are not imposed upon Oklahoma residents.

9. In order to equalize the burden placed upon such Oklahoma resident or base-registered motor carriers by said third-structure taxes, the Oklahoma Legislature enacted 47 O.S. Supp. 1982, §22.5j(K), and 68 O.S. Supp. 1982, §607.1. The purpose of the two Oklahoma enactments, as stated in the statutes and as reflected in House Concurrent Resolution No. 1001, a copy of which is attached hereto as "Exhibit C" and made a part hereof, was to remove the economic disadvantage imposed upon Oklahoma residents and base-registered carriers, by requiring the base-registered residents of those states such as Arkansas and Pennsylvania, who impose the third-structure taxes, to pay a comparable or "mirror tax"

when such carriers operate within the borders of this State.

10. Pursuant to the Oklahoma Statutes in question, plaintiffs Circle W Transportation Inc. and Roy E. Griffis, have been assessed the taxes as alleged in paragraph 16 of plaintiffs' petition.

11. Defendant denies that plaintiffs are unconstitutionally discriminated against; or that the impact upon and the cost incurred by plaintiffs as a result of the imposition of the Oklahoma tax, constitute an impermissible burden upon or discrimination against the plaintiffs. Rather, defendant asserts that the imposition and impact of said Oklahoma taxes merely equalize the burdens placed upon interstate commerce, and particularly upon Oklahoma base-registered carriers, by the third-structure taxes imposed by said other states.

SECOND DEFENSE

12. Defendant asserts that the proceeds of the taxes herein challenged are used for the construction and maintenance of the roads and highways of this State, and have a reasonable relationship to the services provided by the State of Oklahoma.

13. Defendant denies that the Oklahoma Statutes herein complained of, either in their enactment or their application to plaintiffs, violate the provisions of either the United States Constitution or the Constitution of the State of Oklahoma.

14. Defendant further asserts that the plaintiffs are reasonably classified for the purposes of the taxes herein

challenged; and denies that the imposition of these taxes constitutes a denial of the privileges and immunities of the citizens of the several states.

THIRD DEFENSE

15. Defendant denies that the actions or statutes herein complained of constitute a cause of action cognizable under the Federal Civil Rights Act as contained in 42 U.S.C., §1983.

16. Defendant further denies any allegation or averment contained in said petition which may be inconsistent with the statements and averments contained herein.

WHEREFORE, defendant prays that plaintiffs be denied all relief herein; and that defendant may have its costs and such other relief as may be proper.

/s/ Stanley Johnston
J. LAWRENCE BLANKENSHIP,
General Counsel, Oklahoma
Tax Commission
DONNA E. COX, Attorney
STANLEY JOHNSTON, Attorney
2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141

Attorneys for Oklahoma Tax
Commission

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January, 1985, a true and correct copy of the foregoing Answer was mailed to:

TO: Jacob P. Billig
Richard A. Allen
David F. Smith
Billig, Sher & Jones, P.C.
2033 K Street, N.W.
Suite 300
Washington, D.C. 20006
Attorneys for Plaintiffs

William B. Rogers
6440 Avondale Drive
Suite 200
Oklahoma City, OK 73116
Attorney for Plaintiffs

Thomas L. Spencer
Assistant Attorney General
112 State Capitol Building
Oklahoma City, OK 73105
Attorney for State of Oklahoma and Leo Winters, State Treasurer

/s/ Stanley Johnston

EXHIBIT "A"

75-817.3. Highway use equalization tax.

(a) As used in this Section of this Act, the following terms shall have the following meanings:

(1) "Department" means the Director of the Arkansas State Highway and Transportation Department;

(2) "Division" means the Commissioner of Revenues, Department of Finance and Administration, State of Arkansas;

(3) "Motor Vehicle", as used herein, means all cargo vehicles required to be registered for use upon the public highways of this State, designed, used or maintained primarily for the transportation of property and having a declared gross weight of 73,281 pounds or more. For the purpose hereof, truck-tractors, single unit trucks, semi-trailers and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or control, or the right to the use or control of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this Section of this Act;

(3) [(4)] "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck-tractor;

(4) [(5)] "User" includes any person having the use and control or the right to the use and control, of any motor vehicle;

(5) [(6)] "Highway" includes all highways, roads, and streets of this State generally open to the use of the public as a way for vehicular traffic;

(6) [(7)] "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semi-trailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(7) [(8)] "Arkansas Registered Vehicle" or "Arkansas Registered Truck" means a vehicle registered

in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate.

(b) A tax is hereby imposed upon all users, as defined in Subsection (a), above, of motor vehicles, as herein defined, in compensation for the use of the highways of this State to be known as the "Highway Use Equalization Tax". Such tax shall be in addition to all other taxes now required to be paid on such vehicles except as hereinafter provided.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in Subsection (a), above is 73,280 pounds or less, nor to vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, and clay minerals, and ores, from the point of production, harvesting or severance to the point at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state, nor to any vehicle owned and operated by the United States of America or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this Section of this Act shall not apply to any motor vehicle used on an interstate trip with an origin or destination within 10 miles of the geographic boundaries of this State, provided the one-way travel distance in the State is not over 10 miles.

(e)(1) The user of every vehicle subject to this Section of this Act and which is an Arkansas registered vehicle, before operating such vehicle over the highways of this State, shall qualify such vehicle with the Division.

Qualifications shall be made by application to the Division on forms to be provided by said Division. Said application maybe filed with the Division at the time of registration of the vehicle.

(2) Such application shall be accompanied by payment to the Division of a fee of five dollars ($5.00), to be deposited into the Constitutional and Fiscal Agencies Fund, which shall cover the clerical cost of such qualification. Upon receipt of such application and payment of the tax as hereinafter determined, the Division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of which is to be carried in the cab of the vehicle at all times. The said registration certificate or registration cab card shall, in addition to the registration information and the required certification, show the amount of tax paid for such vehicle as determined by Subsection (f) of this Section.

(f)(1) At the time of such qualification of any Arkansas registered truck subject to this Section which is registered through the International Registration Plan, the Division may fix a mileage rate in cents per mile for each truck so registered and qualified. The Division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Mileage Rate (dollars)
73,281-80,000	$.05

The tax determined under this provision for every truck subject thereto shall be in the amount of the determined

mileage rate multiplied by each mile such truck is operated over the highways of this State, as reported to the Division for registration under the International Registration Plan.

(2) At the time of such qualification of any Arkansas registered truck subject to the provisions of this Section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the applicable mileage rate set forth by Subsection (f)(1) of this Section. The Division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

Vehicle Weight (pounds)	Annual Tax (dollars)
73,281-80,000	$175

(g) The tax, as determined by either Subsection (f)(1) or Subsection (f)(2) of this Section, shall become due and payable at the time of registration. No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this Act until such time as the full amount of the tax determined to be due under the provisions of this Section, together with all penalties, shall have been paid.

(h) The Division is hereby authorized to collect those taxes and fees imposed by this Section upon the Arkansas registered users subject to the provisions of this Act [§§ 75-817.2, 75-817.3, 75-819(b)], to make timely deposits into the State Treasury of all such moneys collected by the Division, and to administer the provisions

of this Section as they pertain to Arkansas registered users, including the right to inspect and audit at reasonable times at any place within this State the books, records and documents of any Arkansas registered users required to pay the Highway Use Equalization Tax hereby imposed.

(i)(1) The user of any vehicle, subject to the provisions of this Section, may, in lieu of qualification in accordance with the provisions of Subsection (e) of this Section, remit to the Department either an annual mileage tax in an amount determined by Subsection (f)(2) of this Section, or pay an amount determined by the applicable mileage rate set forth in (f)(1) of this Section, or pay a trip permit fee. It is the intent of this Act that all users, subject to the provisions of this Section, must either qualify with the Division as provided in Subsection (e) of this Section and pay the appropriate taxes, or comply with the provisions of this Subsection. Provided, that, all Arkansas registered vehicles must qualify with the Division and remit such taxes to the Division. If the user elects to pay the annual mileage tax, the Department, upon application thereof and receipt of such payment, shall issue an annual mileage tax certificate to the user which shall, by the user, be affixed to the cab of such vehicle. If the user elects to pay an amount determined by the applicable mileage rate set forth in (f)(1) of this Section, the Department shall utilize the appropriate rate multiplied by each mile such vehicle was operated over the highways of this State for the preceding twelve month period based on mileage records of the user acceptable to the Department. Upon payment of such amount, the Department shall issue a certificate to the user, which shall, by the user, be

affixed to the cab of such vehicles. If the user elects to utilize a trip permit, such trip permits for trucks with a gross weight of 73,281 pounds through 80,000 pounds shall be issued at a fee of eight dollars ($8.00) for each 100 miles of travel, rounded to the nearest 100 miles, whether loaded or unloaded. Said permits shall be issued by the Department in such forms as it deems appropriate.

(j) The tax provided for in this Section of this Act must be paid by the users of all applicable vehicles using the highways of this State, and no reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this State and those of any other State may exempt any user of such vehicles using the highways of this State from the provisions of this Section of this Act and payment of the tax levied by this Section of this Act.

(k) Any user found operating any vehicle subject to the provisions of this Section of this Act over the highways of this State without complying with this Section or without having available in or on the cab thereof of the appropriate certificate or trip permit required by this Section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of no less than two hundred dollars ($200.00) and not more than five hundred dollars ($500.00) for the first offense and of no less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000.00) for each subsequent offense.

(l) This Section of this Act shall be liberally construed to effectuate the purposes thereof.

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not specifically classified as "Constitutional and Fiscal Agencies Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month: 15% of the amount thereof, to the County Aid Fund; 15% of the amount thereof, to the Municipal Aid Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law." [Acts 1983, No. 685, § 2, p. ___.]

EXHIBIT "B"

CHAPTER 99. – AXLE TAX FOR HIGHWAY BRIDGE IMPROVEMENT

Sec.		Sec.	
9901.	Definitions.	9905.	Rebate in case of incidental travel.
9902.	Imposition of axle tax.	9906.	Penalties
9903.	Report and payment of tax.	9907.	Deposit of proceeds and purpose of tax.
9904.	Axle tax markers required.	9908.	Appropriation.
		9909.	Administration and enforcement.

§ 9901. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Department." The Department of Revenue.

"Motor carrier." Every person who operates or causes to be operated any motor vehicle on any highway in this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9902. Imposition of axle tax

In addition to any other tax imposed by law, all motor carriers shall pay an annual tax in the amount of $36 per axle on every truck, truck tractor or combination having a gross weight or registered gross weight in excess of 26,000 pounds operated on the highways of this Commonwealth.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

Library References

Automobiles 97.
C.J.S. Motor Vehicles § 136.

§ 9903. Report and payment of tax

The tax shall be paid to the department at the time a motor carrier applies for vehicle registration or for the issuance of an identification marker or permit pursuant to section 2102 (relating to identification markers required). No registration card or identification marker or

permit shall be issued unless the tax imposed by section 9902 (relating to imposition of axle tax) has been paid.

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9904. Axle tax markers required

(a) General rule. – The Secretary of Revenue shall provide axle tax markers for each truck, truck tractor or combination upon which axle tax has been paid pursuant to section 9902 (relating to imposition of axle tax). The marker must be affixed to the vehicle and displayed as prescribed by regulation prior to the operation of the vehicle in this Commonwealth.

(b) Issuance of markers. – The axle tax marker shall be issued for a 12-month period which coincides with the period of validity of either the identification marker or registration referred to in section 9903 (relating to report and payment of tax).

(c) Penalty. – Any person who operates or causes to be operated in this Commonwealth any vehicle not displaying the axle tax marker as required by this section commits a summary offense and shall, upon conviction, be sentenced, for a first offense, to pay a fine of not less than $200 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $300 nor more than $500 or to imprisonment for not more than 90 days, or both.

(d) Exception. – This section shall not apply to a person operating a vehicle under a valid permit issued pursuant to section 2102(d)(2) (relating to identification markers required).

1982, Dec. 8, P.L. 842, No. 234, § 3, effective April 1, 1983. As amended 1983, July 7, P.L. 32 No. 19, § 6, imd. effective.

1983 Amendment: Rewrote section which prior thereto read:

"§ 9904. Evidence of payment.

"The issuance of a registration card or vehicle identification marker or permit shall be prima facie evidence that any tax imposed by section 9902 (relating to imposition of axle tax) has been paid."

Section 7 of Act 1983, July 7, P.L. 32, No. 19, provides as follows:

"The provision of sections 1 [§ 102 of this title], 3 [§ 4904 of this title], 4 [§ 4908 of this title], 5 [§ 4921 of this title] and 6 [§§ 4923, 4943 and 9904 of this title] insofar, as it relates to section 4923 of this amendatory act shall be effective only as long as Federal law or the Federal Highway Administration shall require this Commonwealth to allow combinations consisting of a truck tractor and two trailers and combinations in excess of 60 feet in length to be driven on its highways. Notice of a change in the Federal mandate shall be published in the Pennsylvania Bulletin by the Secretary of Transportation and the provisions of this act shall be void 30 days thereafter."

§ 9905. Rebate in case of incidental travel

The full axle tax applies to vehicles which travel at least 2,000 miles annually in this Commonwealth. Vehicles traveling less than 2,000 miles annually may file with the department for an axle tax rebate which shall be supported by such data as may be required by the department

by regulation. The rebate will be calculated in accordance with the following formula:

$$\frac{2{,}000 - \text{actual miles travelled}}{2{,}000} \times \text{axle tax paid} = \text{rebate}$$

1982, Dec. 8 P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9906. Penalties

In addition to any penalties which may be imposed for the failure to register a vehicle or obtain and display an identification marker or special permit, any person who willfully fails to pay the tax imposed by this chapter when due commits a summary offense and, upon conviction shall be sentenced, for a first offense, to pay a fine of not less than $100 nor more than $500 and, for each subsequent or additional offense, to pay a fine of not less than $200 nor more than $500 or to undergo imprisonment for a term not exceeding 90 days or both.

1982, Dec. 8 P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9907. Deposit of proceeds and purpose of tax

(a) General rule. – Proceeds from all taxes and penalties imposed by this chapter shall be deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund, which account is hereby created.

(b) Purpose of tax. – It is the declared policy of the Commonwealth that the money raised by the tax imposed by this chapter be used, to the greatest extent possible, to provide for the creation of jobs and the rehiring of the

unemployed in this Commonwealth. In order to reach this goal, firms with Pennsylvania-based facilities shall be actively solicited to make bids on contracts to furnish products and materials, including, but no limited to, steel and steel products, to be used in the projects funded through the Highway Bridge Improvement Restricted Account.

1982, Dec. 8 P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9908. Appropriation

The funds deposited in the Highway Bridge Improvement Restricted Account within the Motor License Fund are hereby annually appropriated out of the account upon authorization by the Governor, for expenditure on bridge rehabilitation, replacement and removal projects pursuant to the act of December 8, 1982 (P.L. 848, No. 235), known as the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983," in accordance with the following priorities:

(1) The first priority is to the Treasury Department for deposit into the Capital Debt Fund for the payment of debt service on general obligation bonds of the Commonwealth which may be issued from time to time to fund any project described in the "Highway-Railroad and Highway Bridge Capital Budget Act for 1982-1983."

(2) The second priority is to the Department of Transportation in the event excess funds are available after the annual debt service requirements have been satisfied for:

(i) The non-Federal share of bridge rehabilitation, replacement and removal projects on State-owned bridges and bridges of undetermined ownership on State highways.

(ii) Grants to counties or municipalities to fund up to 80% of the non-Federal share of bridge rehabilitation, replacement and removal projects on county-owned or municipal-owned bridges, and bridges of undetermined ownership on county or municipal highways. The balance of the costs for these bridge projects shall be funded by the respective county or municipality or by private funds.

1982, Dec. 8 P.L. 842, No. 234, § 3, effective April 1, 1983.

§ 9909. Administration and enforcement

(a) General rule. – The Departments of Revenue and Transportation shall jointly promulgate any regulations necessary for the proper administration and enforcement of this chapter.

(b) Appeal procedures. – The procedures for appeals relating to the tax imposed by this chapter shall be consistent with those contained in Chapter 95 (relating to oil company franchise tax for highway maintenance and construction).

1982, Dec. 8 P.L. 842, No. 234, § 3, effective April 1, 1983.

EXHIBIT "C"

THIRTY-NINTH LEGISLATURE

MOTOR VEHICLES-FEES-TAXES-COLLECTION

H.C. Res. No.1001

A CONCURRENT RESOLUTION URGING THE OKLAHOMA TAX COMMISSION TO COLLECT CERTAIN FEES AND TAXES; ENCOURAGING THE NEGOTIATION OF CERTAIN AGREEMENTS; AND DIRECTING DISTRIBUTION.

WHEREAS, the 2nd Session of the 38th Oklahoma Legislature enacted House Bill No. 1855, Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K), which provide that a use fee or tax may be imposed upon a resident of another state for the operation of vehicles in this state if the other state imposes a similar use fee or tax upon Oklahoma residents for the operation of vehicles in said other states; and

WHEREAS, the collection of said fee or tax is discretionary and the decision to collect the fee or tax is the responsibility of the Oklahoma Tax Commission; and

WHEREAS, Oklahoma residents who must pay a fee or tax in other states are placed at an economic disadvantage because nonresidents do not have to pay a comparable fee or tax in this state; and

WHEREAS, it is the intent of the Legislature that the fee or tax authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S.

Supp. 1982, Section 22.5j, subsection K) be collected from nonresident if the state of residence of said nonresident imposes and collects a similar fee or tax from Oklahoma nonresidents.

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE 1ST SESSION OF THE 39TH OKLAHOMA LEGISLATURE, THE SENATE CONCURRING THEREIN:

SECTION 1. The Oklahoma Legislature urges the Oklahoma Tax Commission to collect the fees and taxes authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K) from nonresident operating vehicles in this state if the state of residency of such nonresident imposes a similar fee or tax upon Oklahoma residents.

SECTION 2. The Oklahoma Legislature further encourages the Oklahoma Tax Commission to negotiate with other states imposing a use fee or tax similar to the fees and taxes authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K) to provide for reciprocity agreements which would exempt Oklahoma residents operating vehicles in other states from such fees or taxes in exchange for exempting residents of other states from the provisions of Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K).

SECTION 3. Copies of this resolution shall be dispatched to members of the Oklahoma Tax Commission.

Adopted by the House of Representatives the 7th day of March, 1983.

Adopted by the Senate the 2nd day of May, 1983.

Filed with the Secretary of State May 3, 1983.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On Behalf of Themselves and all Others Similarly Situated, Plaintiffs, v. STATE OF OKLAHOMA, OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Individually as Chairman of the Oklahoma Tax Commission, ROBERT L. WADLEY, Individually and as Vice-Chairman of the Oklahoma Tax Commission, J.L. MERRILL, Individually and as Secretary-Member of the Oklahoma Tax Commission, and LEO WINTERS, Individually and as State Treasurer of Oklahoma, Defendants.	CJ-84-9902 (Filed Jan. 28, 1985)

MOTION TO DISMISS

The defendants, State of Oklahoma, in its corporate capacity and Leo Winters, individually and in his official capacity, move this Court through Michael C. Turpen, Attorney General to dismiss the above-styled cause pursuant to 12 O.S.Supp.1984, § 2012(b). Plaintiffs have failed to state a claim upon which relief can be granted and, as to at least one plaintiff, this Court lacks jurisdiction over

the subject matter of this suit. In support of this motion, the above-named defendants allege as follows:

1. Plaintiffs bring this action under 68 O.S.1981, § 226(c) under 42 U.S.C. § 1983 alleging certain State statutes are unconstitutional and asking for declaratory, monetary and injunctive relief.

2. The State of Oklahoma is not a "person" within the meaning of 42 U.S.C. § 1983 and therefore not subject to suits under this section.

3. Leo Winters, as State Treasurer and individually, is not a tax collector and plaintiffs have not alleged, nor could they prove any acts committed by him which even arguably deprive them of rights secured under the U.S. Constitution, and therefore no claim has been stated against defendant Winters under 42 U.S.C. § 1983.

4. Under Plaintiff's causes of action brought pursuant to 68 O.S.1981, § 226, the statute specifically states that the Oklahoma Tax Commission shall be the sole necessary or proper party to such suits, so no cause of action has been stated as to the defendant State of Oklahoma, in its corporate capacity, or defendant Winters, individually or in his official capacity.

5. Plaintiffs Private Truck Council of America, Inc., and Circle W. Transportation, Inc., are corporations and, therefore, have no cause of action under the Privileges and Immunities Clause. U.S. Const. Art. IV, § 2, cl.1.

6. Plaintiffs do no allege, nor could they prove that defendant Winters has acted in bad faith or in a willful or wanton manner. State Treasurer is [sic] a public officer is not individually liable to Plaintiffs in damages.

7. Plaintiffs have not alleged nor could they prove that Leo Winters has acted in bad faith or deprived Plaintiffs of clearly established constitutional rights, therefore, he has absolute immunity from damages in his individual and official capacity.

8. The Plaintiffs have adequate and duplicate State created remedies to assert their federal constitutional claims so an action under 42 U.S.C. § 1983 will not lie in state court.

9. No cause of action has been stated as to unnamed class members under 68 O.S.1981, § 226 or 42 U.S.C. § 1983 since it is not alleged they have complied with statutory administrative notice provisions which are a prerequisite to instituting a tax refund action under state statute.

10. This Court lacks subject matter jurisdiction over any alleged cause of action of the Plaintiff, Private Truck Council of America, Inc., since it is not an Oklahoma taxpayer, is [sic] is not subject to the tax which they allege to be unconstitutional or otherwise has a stake in the outcome of this suit. As a private association they do not have standing to sue on behalf of its membership since individual participation of certain members will be required. This is so because each member's tax and his right to refund will vary without standing and a justiciable controversy between Private Truck Council and the

defendants, this Court lacks subject matter jurisdiction over the action.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF
OKLAHOMA

/s/ Thomas L. Spencer
THOMAS L. SPENCER OBA
8501
ASSISTANT ATTORNEY
GENERAL

/s/ F. Andrew Fugutt
F. ANDREW FUGUTT
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

On this 28th day of January, 1985, a true and correct copy of the foregoing was mailed, postage prepaid, to:

Mr. Kent F. Frates
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Mr. Jacob P. Billig and
Mr. Richard A. Allen and
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General Counsel, and
Mr. Stanley Johnston and
Ms. Donna Cox
Oklahoma Tax Commission, Legal Division
M.C. Connors Building
Oklahoma City, OK 73105

/s/Thomas L. Spencer
THOMAS L. SPENCER

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W. TRANSPORTATION, INC., and ROY E. GRIFFIS, On Behalf of Themselves and all Others Similarly Situated, Plaintiffs,	)	CJ-84-9902
v.	)	
STATE OF OKLAHOMA; OKLAHOMA TAX COMMISSION; ODIE A. NANCE, Individually and as Chairman of the Oklahoma Tax Commission; ROBERT L. WADLEY, Individually and as Vice-Chairman of the Oklahoma Tax Commission; J. L. MERRILL, Individually and as Secretary-Member of the Oklahoma Tax Commission; and LEO WINTERS, Individually and as State Treasurer of Oklahoma, Defendants.	)	

DISMISSAL WITHOUT PREJUDICE

COME NOW the plaintiffs and dismiss the above-entitled action as to the defendants, The State of Oklahoma and Leo Winters, State Treasurer, specifically reserving its cause(s) of action against all remaining defendants, specifically The Oklahoma Tax Commission, Odie A. Nance, individually and as Chairman of the

Oklahoma Tax Commission; Robert L. Wadley, individually and as Vice-Chairman of the Oklahoma Tax Commission; and J. L. Merrill, individually and as Secretary-Member of the Oklahoma Tax Commission.

/s/William B. Rogers
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Attorneys for plaintiffs herein

CERTIFICATE OF MAILING

This is to verify that a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed this 7th day of February, 1985, to Thomas L. Spencer, Esq., Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, and to Stanley Johnston, Esq., Oklahoma Tax Commission Legal Division, M. C. Connors Building, 2501 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105; and to Thomas G. Ferguson, Jr., and James E. Walker, 6412 North

Santa Fe, P. O. Box 54526, Oklahoma City, Oklahoma 73154, and Wilburn L. Williamson, Dykeman, Williamson & Williamson, Suite 107, 50 Classen Center, 5101 North Classen Boulevard, Oklahoma City, Oklahoma 73118, attorneys for Associated Motor Carriers of Oklahoma, Inc., applicant for intervention.

/s/ William B. Rogers
William B. Rogers

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., CIRCLE W TRANSPORTATION, INC. and ROY E. GRIFFIS, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. OKLAHOMA TAX COMMISSION, ODIE A. NANCE, Individually and as Chairman, Oklahoma Tax Commission, ROBERT L. WADLEY, Individually and as Vice-Chairman, Oklahoma Tax Commission, J. L. MERRILL, Individually and as Secretary-Member, Oklahoma Tax Commission Defendants.	No. CJ-84-9902 (Filed Mar. 8, 1985)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DROP DEFENDANTS AND PLAINTIFF AND MOTIONS TO DISMISS

This memorandum replies to the Motion To Drop Party Plaintiff For Misjoinder and Motion to Dismiss filed by defendant Oklahoma Tax Commission and Motion[s] to Drop Party Defendant For Misjoinder and Motion[s] to Dismiss filed by each of the three defendant members of

the Oklahoma Tax Commission, Messrs. Nance, Wadley and Merrill. Plaintiffs filed a Motion For Summary Judgment and a supporting Memorandum on February 14, 1985, which fully sets forth the facts and the grounds for plaintiffs' claim that the taxes and fees assessed under 68 O.S. (Supp. 1983) § 607.1 and 47 O.S. (Supp. 1983) § 22.5j(K) are unconstitutional. Plaintiffs will not reiterate the facts and those arguments here, but will only address here the specific contentions addressed by the defendants in the above-referenced motions.

I. THE TAX COMMISSION'S MOTION IS WITHOUT MERIT AND SHOULD BE DENIED

The Tax Commission's motion seeks to drop the Private Truck Council of America, Inc. (PTCA) from the case and to dismiss the action as to it on the ground that PTCA is not itself a taxpayer. The Commission's contention is without merit because this is a class action which seeks not only refunds of taxes paid but also a declaration that the challenged statutes are unconstitutional and an injunction against their future enforcement. The standing of an association like PTCA to seek such relief on behalf of its members is well settled in Oklahoma, in the federal courts and in most other states. *See, e.g., Democratic Party of Oklahoma v. Estep,* 652 P.2d 271 (Okla. 1982); *Oklahoma Association of Municipal Attorneys v. State of Oklahoma,* 577 P.2d 1310 (Okla. 1978); *Oklahoma State AFL-CIO v. State Board For Property and Casualty Rates,* 463 P.2d 693 (Okla. 1970), all sustaining suits by associations brought on behalf of their members.

In *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Supreme Court of the United States articulated the criteria that are generally applied in both federal and state courts to determine the standing of associations:

> [W]e have, recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

There can be no doubt that PTCA satisfies these criteria with respect to the claim for declaratory and injunctive relief in this case. PTCA is a non-profit business association that was incorporated in 1939 under the laws of New York and that now has more than 1,800 members that operate from a few to large fleets of motor vehicles in interstate commerce in furtherance of their primary, non-transportation businesses and that are thus exempt as private carriers from the jurisdiction of the Interstate Commerce Commission. Many of its members are subject to the challenged taxes because they have vehicles registered in states against which Oklahoma retaliates, and would thus have standing to sue in their own right.

The interest of its members that PTCA seeks to protect are plainly germane to its purpose. PTCA has functioned since 1939 to promote and protect the interests of

private carriers by a variety of means, including disseminating information and undertaking other educational activities on behalf of its members; presenting the views of private carriers on federal and state legislative proposals or regulatory issues; supporting efforts to promote uniform state laws affecting private carriers; and participating when necessary in judicial proceedings affecting the interests of its members. Among other judicial proceedings in which PTCA has participated on behalf of its members, it successfully prosecuted a class action challenging the constitutionality of an Indiana property tax imposed on interstate motor carriers, which resulted in more than $18 million in refunds being paid to more than 20,000 motor carriers. *Private Truck Council of America Inc. v. Huie,* 466 N.E.2d 485 (Ind. 1984). Furthermore, the instant action is one of seven similar and coordinated class action suits that PTCA together with some of its members and other carriers have brought against the seven states that have implemented retaliatory taxes similar to Oklahoma's.[1]

Finally, neither the constitutional claims asserted nor the petition's request for declaratory and injunctive relief requires the participation of individual members in the suit. *See, e.g., Warth v. Seldin,* 422 U.S. 490, 515 (1975). Because the complaint includes two individual motor carriers and because it is brought as a class action, it also seeks by way of relief refunds of all taxes that may have been paid by the time of the Court's final judgment. That

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[1] The other six states are Maine, New Hampshire, New Jersey, Georgia, Nebraska and Florida.

fact, however, does not affect PTCA's standing to seek declaratory and injunctive relief.

The cases are legion in which federal and state courts have permitted associations like PTCA to maintain suits on behalf of their members. We have already noted three Oklahoma cases that have done so.[2] With respect specifically to constitutional challenges to state taxes, we also noted the *PTCA v. Huie* case in Indiana. In addition, in another similar case, the Supreme Court of Maine upheld a constitutional challenge to a Maine tax on trucks based outside of Maine that was brought as a class action by the American Trucking Associations, Inc. *American Trucking Associations v. Quinn,* 437 A.2d 623 (Me. 1981). Similarly, in *American Trucking Associations v. Conway,* 451 A.2d 42 (Vt. 1982), the Supreme Court of Vermont remanded for further adjudication another class action challenge to a

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[2] The reasons for recognizing the standing of associations to bring suit on behalf of their members were well stated by the Supreme Court of Appeals of West Virginia in *Snyder v. Callaghan,* 284 S.E.2d 241, 251 (W. Va. 1981):

> [N]o constructive purpose is served from a procedural standpoint by requiring the members of an organization which fulfills these requirements to maintain individual suits. . . . Permitting the association or organization to sue to protect the common interests of its members avoids multiplicity of suits by similarly situated plaintiffs involving the same or similar causes of action and provides an efficient and expeditious method of adjudicating disputes.

See also *Massachusetts Association of Independent Insurance Agents and Brokers, Inc. v. Commission of Insurance,* 373 Mass. 290, 367 N.E.2d 796, 802 (1977); *Crescent Park Tenants Association v. Realty Equities Corp of New York,* 58 N.J. 98, 275 A.2d 423, 438-439 (1971).

Vermont fee system by the same plaintiff. And in *American Trucking Associations v. O'Neill,* 522 F. Supp. 49 (D. Conn. 1981), the court granted injunctive relief to the same plaintiff against a Connecticut tax on motor carriers.

In sum PTCA clearly has standing to maintain this action for declaratory and injunctive relief on behalf of its members, and defendant Tax Commission has offered no reasons for reaching a contrary result.[3]

II. THE MOTIONS OF THE INDIVIDUAL DEFENDANTS SHOULD ALSO BE DENIED

Each of the individual defendants, who are the members of the Oklahoma Tax Commission, have moved to dismiss the action as to them, contending that the Tax Commission itself "is the sole, necessary and proper party defendant herein."

This contention is incorrect because plaintiffs' claims include a claim under 42 U.S.C. § 1983. As explained more fully in plaintiffs' Memorandum In Support of Plaintiffs' Motion For Summary Judgment at pp. 30-32, § 1983 gives plaintiffs a federal statutory cause of action against the individual defendants (and, under its counterpart, 42 U.S.C. § 1988, a claim for attorneys' fees in the event they prevail). Although defendants' motions assert that the petition does not allege that they have acted with "malice, oppression or willful misconduct," those allegations are legally unnecessary to plaintiffs' claims under

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[3] None of the cases cited in defendant's motion involved associations and none of them suggested that an association like PTCA would lack standing in a case like this.

§ 1983. That is so because these individuals have been sued in their official capacity as well as individually. Good faith is not a defense to a claim under § 1983 against a state official acting in his official capacity because, as the Supreme Court recently explained, such a claim, if sustained, in fact "imposes liability on the entity that he represents," and a good faith defense is not available to governmental entities. *Brandon v. Holt*, ___ U.S. ___, 53 U.S.L.W. 4122, 4124 (January 21, 1985). *See also Hutto v. Finney*, 437 U.S. 678, 693-694 (1978), holding the State of Arkansas liable for attorneys' fees under § 1988 in a § 1983 action against state officials in their official capacity notwithstanding the absence of bad faith.

In short, the individual members of the Tax Commission are proper defendants to plaintiffs' claim under 42 U.S.C. § 1983.

CONCLUSION

The Oklahoma Tax Commission's Motion To Drop Party Plaintiff For Misjoinder and Motion To Dismiss and the Motion(s) To Drop Party Defendant For Misjoinder and Motion(s) To Dismiss filed by each of the three defendant members of the Tax Commission should be denied.

Respectfully submitted,

OF COUNSEL:

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Attorneys for Plaintiffs

March 8, 1985

CERTIFICATE OF MAILING

This is to verify that true and correct copies of the above and foregoing Plaintiffs' Memorandum in Opposition to Motions to Drop Defendants and Plaintiff and Motions to Dismiss were mailed this ___ day of March, 1985, to Thomas L. Spencer, Esq., Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, and to Stanley Johnston, Esq., Oklahoma Tax Commission Legal Division, M. C. Connors Building, 2501 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105; and to Thomas G. Ferguson, Jr., and James E. Walker, 6412 North Santa Fe, P. O. Box 54526, Oklahoma City, Oklahoma 73154, and Wilburn L. Williamson, Dykeman, Williamson & Williamson, Suite 107, 50 Classen

Center, 5101 North Classen Boulevard, Oklahoma City, Oklahoma 73118, attorneys for Associated Motor Carriers of Oklahoma, Inc., applicant for intervention.

Copies have also been supplied to Michael C. Turpen, Attorney General, State Capitol, Oklahoma City, Oklahoma 73105, and to Mark Grossman, Esq., Crowe & Dunlevy, 20 North Broadway, Oklahoma City, Oklahoma 73102.

William B. Rogers

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., Plaintiffs,	)	
vs.	)	
STATE OF OKLAHOMA, et al., Defendants.	)	No. CJ-84-9902
ASSOCIATED MOTOR CARRIERS OF OKALHOMA [sic], INC., Intervenor.	)	

ORDER DISMISSING CAUSE AS TO INDIVIDUAL PARTIES DEFENDANT

This cause comes on for hearing on the 29th day of March, 1985, upon the separate motions of Odie A. Nance, Robert L. Wadley and J. L. Merrill, to drop each of said parties as a defendant herein, both in their official capacities and as individuals, and to dismiss this cause as against them.

All parties appear by counsel, and the Court, having heard and considered the arguments, representations and stipulations of counsel, finds:

1. That the petition fails to state a claim against the said defendants as individuals, or any of them, upon which relief can be granted herein; and

2. That the only claims stated by the pleadings herein or presented to the Court by plaintiffs' counsel upon oral argument, are against said defendants in their official capacities as members of the defendant, Oklahoma Tax Commission; and all of such claims, if proven, are such upon which relief may be granted only against said Oklahoma Tax Commission.

IT IS THEREFORE ORDERED that this action is hereby dismissed as against the defendants, Odie A. Nance, Robert L. Wadley and J. L. Merrill, as individuals, for failure to state a claim upon which relief can be granted; and said individuals are hereby dropped as parties defendant herein.

IT IS FURTHER ORDERED that said Odie A. Nance, Robert L. Wadley and J. L. Merrill are hereby retained as parties defendant only in their official, representative capacities as members of the defendant Oklahoma Tax Commission.

_____

DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Richard A. Allen

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Attorneys for Plaintiffs

/s/ Stanley Johnston
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Attorneys for Defendants

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., Plaintiffs,	)	No. CJ-84-9902
v.	)	(Filed Apr. 19, 1985)
STATE OF OKLAHOMA, et al., Defendants.	)	
ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC., Intervenor.	)	

MOTION TO DISMISS

Defendants Odie A. Nance, Robert L. Wadley and J. L. Merrill, in their official capacities as Chairman, Vice-Chairman and Secretary-Member, respectively, of the Oklahoma Tax Commission, each move the Court to dismiss Count III of the petition herein and the claim therein contained, because the petition fails to state a claim in said Count III upon which relief can be granted, for the following reasons:

1. The petition contains no allegations of any acts whatsoever by the defendants;

2. The petition contains no allegations of any acts by the defendants which have deprived plaintiffs of any clearly established right, privilege or immunity secured to plaintiffs by the United States Constitution;

3. The petition contains no allegations that defendants have, either intentionally or with reckless disregard, violated plaintiffs' clearly established constitutional rights, or that defendants have acted in bad faith;

4. Plaintiffs have failed to allege any acts by the defendants, the relief for which is cognizable under the federal Civil Rights Act (42 USC §1983);

5. Plaintiffs have alleged that the defendants are "liable" to plaintiffs, but have alleged no damages or facts giving rise to any damages.

/s/ Stanley Johnston
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Tax Commission
DONNA E. COX, Attorney
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(405) 521-3141
Attorneys for Defendants

CITATION OF AUTHORITIES

Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 102 S. Ct. 177 (1981); *Fulton Market Cold Storage Co. v. Cullerton*, 582 F. 2d 1071 (C.A. 7th, 1978); *North American Cold Storage Co. v. County of Cook*, 468 F. Supp. 424 (D.C. Ill., 1979); *Bormann v. Tomlin*, 461 F. Supp. 193 (D.C. Ill., 1978).

LEAVE GRANTED TO FILE:
/s/ John M. Amick
District Judge

NOTICE OF MOTION

TO:

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Attorneys for Intervenor

The foregoing motion will be presented for hearing before the Honorable John Amick in his court room at the Oklahoma County Courthouse, City of Oklahoma City, on the 10th day of May, 1985 at 9:00 o'clock A.m., or as soon thereafter as counsel may be heard.

/s/ Stanley Johnston
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of April, 1985 a copy of the foregoing motion and notice of motion was mailed to the persons named in the said notice, at the addresses therein shown.

/s/ Stanley Johnston
Attorney for Defendants

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., Plaintiffs,	)	No. CJ-84-9902
v.	)	(Filed Apr. 19, 1985)
STATE OF OKLAHOMA, et al., Defendants.	)	
ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC., Intervenor.	)	

ANSWER OF THE DEFENDANTS
ODIE A. NANCE, ROBERT L. WADLEY
AND J. L. MERRILL

Defendants Odie A. Nance, Robert L. Wadley and J. L. Merrill, in their official capacities as Chairman, Vice Chairman and Secretary-Member, respectively, of the Oklahoma Tax Commission, hereby adopt the Answer of the Oklahoma Tax Commission, as amended, and for further answer state:

1. Each defendant denies that he performed any acts in violation of plaintiffs' clearly established constitutional rights.

/s/ Stanley Johnston
J. LAWRENCE BLANKENSHIP
General Counsel, Oklahoma
Tax Commission
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STANLEY JOHNSTON, Attorney
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(405) 521-3141
Attorneys for Defendants

LEAVE GRANTED TO FILE:

/s/ John M. Amick
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of April, 1985 a copy of the foregoing answer was mailed to:

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/s/ Stanley Johnston

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. STATE OF OKLAHOMA, et al., Defendants.	No. CJ-84-9902 (Filed Jun. 26, 1985)

POST HEARING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On June 21, 1985, this Court held oral argument on a Motion to Dismiss filed on April 19, 1985 by defendants Odie A. Nance, Robert L. Wadley and J. L. Merrill in their official capacities. At that hearing, counsel for defendants relied upon certain case law not cited in their Motion to Dismiss for the proposition that the plaintiffs are not entitled to relief under the Federal Civil Rights Act, 42 U.S.C. §1983. They argued that neither the Commerce Clause nor the Privileges and Immunities Clause, on which this action is based, protect any "rights, privileges or immunities secured by the Constitution" within the meaning of §1983. It is to this argument that this brief is addressed.

Defendants' motion should be denied, first, because the arguments contained therein have already been

advanced and rejected by this Court. As discussed in Plaintiffs' Memorandum in Opposition to Motion to Dismiss (at pp. 1-3), this Court's order of March 29, 1985 rejected defendants' attempts to have this suit dismissed as to them in their official capacities. Yet that is precisely what defendants attempt to do again here.

Moreover, as a matter of substantive law, defendants' contention is clearly incorrect. 49 U.S.C. §1983 offers wide-ranging protection against the deprivation of *"any* rights, privileges or immunities secured by the Constitution . . . " (emphasis added), including those protected by the Commerce Clause and the Privileges and Immunities Clause. The Supreme Court of the United States in construing this section has said:

> [T]here can be no doubt that §1 of the Civil Rights Act [of 1871] was intended to provide a remedy *to be broadly construed* against *all forms* of official violation of federally protected rights.

Monell v. New York City Department of Social Services, 436 U.S. 658, 700-701 (1978) (emphasis added). The Court has further stated that §1983 embraces *"all* of the Constitution and laws of the United States," *Lynch v. Household Finance Corporation*, 405 U.S. 538, 549 n. 16 (1972) (emphasis added). Thus, it is clear that §1983 was intended to be broadly construed to protect all federal rights.

In support of their position, the defendants cited an Eighth Circuit case which held that the Commerce Clause did not secure a right, privilege or immunity within the meaning of §1983. *Consolidated Freightways Corp. of Del. v. Kassell*, 730 F. 2d 1139 (8th Cir. 1984). However, the defendants failed to discuss two other cases, one of which was

affirmed by the United States Supreme Court, which have held that a violation of the Commerce Clause is indeed actionable under §1983. In *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976), an Indian tribe and some of its members brought a class action contesting the constitutionality of Montana's cigarette sales tax and dealer licensing statutes as applied to them because, among other things, it violated the Commerce Clause. The court concluded the §1983 claim was proper, stating:

> Although §1983 was enacted primarily to enforce the Fourteenth Amendment, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), the Court held in *Lynch* that the phrase "rights, privileges, or immunities secured by the Constitution and laws" includes not only Fourteenth Amendment rights, but "[*all* of] the Constitution [and] laws of the United States", noting its interpretation of similar language with respect to 18 U.S.C. §242 in *United States v. Price*, 383 U.S. 787, 797, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). 404 U.S. at 549, n. 16. We therefore have no difficulty in holding that plaintiffs' alleged violation of Commerce Clause rights is sufficient to state a claim under §1983.

392 F.Supp. at 1304-1305. Later, in *Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), the Third Circuit held that §1983 encompasses Commerce Clause claims. The court stated:

> The present action is properly brought under §1983 because it seeks redress for deprivations of *constitutional rights secured by the Commerce Clause* and of federal statutory rights protected

> by the Williams Act. *See, Maine v. Thiboutot*, ___ U.S. ___, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

637 F.2d at 186 (emphasis added).

The court in *Consolidated Freightways* based its holding on the conclusion that the Commerce Clause does not protect or establish individual rights against government interference. That conclusion, however, is manifestly incorrect. While the underlying purpose of the Commerce Clause is to "create an area of free trade among the several states" *McCleod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), this purpose is achieved by protecting individuals engaged in commerce from discriminatory and excessive taxation and regulatory burdens imposed by state governments.

Thus, the United States Supreme Court has often construed the Commerce Clause as protecting individual rights. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Court granted standing to several stock exchanges to sue on behalf of their members challenging a New York tax which discriminated against out-of-state stock exchanges and their members. In discussing the exchanges' standing to sue on behalf of their members, the Court clearly indicated that the Commerce Clause protects individual rights:

> The exchanges are asserting their *right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business* and they allege that the transfer tax indirectly infringes on that right.

420 U.S. at 320 n. 3 (emphasis added). In further discussing the harm suffered by the individual members, the Court continued:

> The members therefore suffered an actual injury within the *zone of interests protected by the Commerce Clause* and the exchanges satisfy the requirements for representational standing.

Id. (emphasis added). Thus, the Commerce Clause protects a specific zone of interests for individuals. Likewise, in *Maryland v. Louisiana*, the Court's ultimate holding was that

> [T]he first use tax is unconstitutional under the Commerce Clause because it unfairly discriminates against purchasers of gas moving through Louisiana in interstate commerce.

451 U.S. at 760. It is significant that the disputed Louisiana tax was unconstitutional because it discriminated against purchasers of gas, not because it disrupted the federal-state balance with respect to the regulation of commerce.

With respect to the Privileges and Immunities Clause, it would be anomalous indeed if §1983 did not protect against violations of that clause, since §1983 specifically refers to "rights, *privileges or immunities* secured by the Constitution." (Emphasis added.) Moreover, as the plaintiffs noted in their memorandum in support of their motion for summary judgment, the protections of the Commerce Clause and the Privileges and Immunities Clause are similar and frequently overlapping. *Hicklin v. Orbeck*, 437 U.S. 518, 531-532 (1978). Thus, for the same reasons described above with respect to the Commerce

Clause, violations of the Privileges and Immunities Clause should be actionable under §1983.

The case cited by the defendants at oral argument, *Spencer v. South Carolina Tax Commission*, 316 S.E.2d 386 (S.C. 1984), aff'd by an equally divided court, 53 U.S.L.W. 4431 (1985), is inapposite. In that case, the trial court "did not address the §1983 claim" and the South Carolina Supreme Court did not squarely address the applicability of §1983 to a Privileges and Immunities Clause claim. There is no discussion whatever of the Privileges and Immunities Clause or why it should not be covered by §1983. Moreover, since the decision below was affirmed by an equally divided Supreme Court, the affirmance has no applicability beyond that specific case. *Laird v. Tatum*, 409 U.S. 824 (1972) (per Rehnquist, J., on motion to recuse).

In further support of their claim that the plaintiffs do not have an appropriate claim under §1983, and their related contention that plaintiffs are not entitled to costs and attorneys' fees under 42 U.S.C. §1988, the defendants cited *Brown v. Hornbeck*, 458 A.2d 900 (Md. 1983) and *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976). These cases are both inapposite.

In *Brown v. Hornbeck*, the court denied §1988 attorneys' fees after a case had settled because it found that the plaintiffs had no colorable Equal Protection claim which would be actionable under §1983. In this case, as has been shown, the plaintiffs have a valid §1983 claim.

In *Backus v. Chivilis*, the court denied §1983 damages for a claim of unequal taxation because the state had statutorily established procedures for equalizing such

assessments. Because of the adequate state law remedy, the court held that the federal cause of action under §1983 was precluded. However, the *Backus* holding has no applicability in this case. Here, although the defendants concede that the State's tax refund statute, 68 O.S. (1981) §226, applies to afford refunds to the plaintiffs, they deny that costs and attorneys' fees are available to the plaintiffs under the common fund doctrine should they succeed in obtaining refunds for the members of the class. As shown in plaintiffs' memorandum in support of their motion for summary judgment, this is incorrect. However, assuming *arguendo* that the defendants are correct, *Backus* would not apply in this case because, according to defendants' theory of the law, the plaintiffs would not be able to obtain costs and attorneys' fees under state law, and therefore would not have a complete and adequate remedy under state law. Attorneys' fees obviously are a substantial part of the plaintiffs' remedy.

For all the foregoing reasons, in addition to the reasons set forth in plaintiffs' initial Memorandum In Opposition To Motion To Dismiss, defendants' Motion To Dismiss should be denied.

Respectfully submitted,

OF COUNSEL:

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CERTIFICATE OF SERVICE

This is to verify that a true and correct copy of the above and foregoing Post Hearing Brief in Opposition to Defendants' Motion to Dismiss was personally delivered this 26th day of June 1985, to Stanley Johnston, Esq., Oklahoma Tax Commission Legal Division, M. C. Connors Building, 2501 North Lincoln Boulevard, Oklahoma City, Oklahoma 73105; and copies were mailed to Thomas L. Spencer, Esq., Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105; to Thomas G. Ferguson, Jr., and James E. Walker, 6412 North Santa Fe, P. O. Box 54526, Oklahoma City, Oklahoma 73154; to Wilburn L. Williamson, Dykeman, Williamson & Williamson, Suite 107, 50 Classen Center, 5101 North Classen Boulevard, Oklahoma City, Oklahoma, 73118.

Copies have also been supplied to Michael C. Turpen, Attorney General, State Capitol, Oklahoma City, Oklahoma 73105, and to Mark Grossman, Esq., Crowe & Dunlevy, 20 North Broadway, Oklahoma City, Oklahoma 73102.

/s/ William B. Rogers
William B. Rogers

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., Plaintiffs,	)	
vs.	)	No. CJ-84-9902
STATE OF OKLAHOMA, et al. Defendants.	)	
ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC., Intervenor.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COUNT III

(Filed June 27, 1985)

This action, brought pursuant to 68 O.S. 1981, §226, involves a challenge on constitutional grounds to Oklahoma's reciprocal tax levied by 68 O.S. Supp. 1982, §607.1 and 47 O.S. Supp. 1982, §22.5(j)(K). In Count I of the Petition, Plaintiffs allege that the taxes imposed by said statutes constitute an unconstitutional burden on interstate commerce. In Count II it is alleged that the taxes constitute a violation of the Privileges and Immunities Clause of the United States Constitution. In Count III Plaintiffs allege that by the imposition of these taxes as provided by statute, the Defendants "are therefore liable to Plaintiffs pursuant to 42 U.S.C. §1983." The relief sought in this action is a declaration by this Court that said taxes are unconstitutional, and a refund of the taxes paid under said statute, both of which forms of relief are

available under §226. By inclusion of Count III, Plaintiffs also seek an award of attorneys fees, which are not provided for by §226.

Defendants Nance, Wadley, and Merrill, Commissioners of the Oklahoma Tax Commission, have moved the Court to dismiss Count III on the grounds that said Count III fails to state a claim upon which relief can be granted, for the reason that the relief sought in Count III, i.e., attorneys' fees, is not an independent right of action cognizable under the Federal Civil Rights Act, 42 U.S.C. §1983.

Upon oral argument of this motion, Plaintiffs' counsel conceded that the Commerce Clause does not secure rights cognizable under §1983; but requested leave to rebut by supplemental brief the authorities cited by Defendant on the proposition that §1983 could not be used to circumvent the provisions of state law for the sole purpose of asserting a claim for attorneys fees.

ARGUMENT AND AUTHORITIES

Initially, Plaintiffs assert that the issue here in question, i.e., the applicability of 42 U.S.C. §1983 for the purposes of claiming attorneys' fees under the attendant Section 1988, has been previously ruled upon by this Court. It has not. On March 29, 1985, this Court dismissed this action as against the individual Defendants Nance, Wadley, and Merrill, for the reason that no cause of action had been stated or claimed against them as individuals. The issue of whether §1983 may be used to support a claim for attorneys' fees in derogation of state law was

neither presented to nor ruled upon by this Court. Plaintiffs' assertion to the contrary is at best an attempt to confuse this issue; and at worst an attempt to mislead this Court.

As to the question whether the Commerce Clause secures rights cognizable under 42 U.S.C. §1983, the Plaintiffs, having conceded Defendant's position in oral argument, now reassert this claim, relying heavily upon *Confederated Salish and Kootenai Tribes v. Moe,* 392 F. Supp. 1297 (D. Mont. 1975), and *Kennecott Corp. v. Smith,* 637 F.2d 181 (3rd Cir. 1980). However, none of the cases cited by Plaintiffs substantially discuss whether the Commerce Clause is a Constitutional provision which secures rights within the meaning of Section 1983; nor did those cases so hold. Further, *Kootenai,* which dealt with state taxation of cigarette sales by Indian tribes on tribal reservation land, was affirmed by the United States Supreme Court on the basis of the supremacy clause rather than the Commerce Clause. 425 U.S. 463, 96 S.Ct. 1634. The Supreme Court in discussing the jurisdictional issues presented by that case, noted that the District Court had found jurisdiction over the individual Indian plaintiffs on the basis of 28 U.S.C. §1343(3), together with their allegation that the taxes deprived them of a right secured by the Commerce Clause, but went on to state "We need not decide this question, however, since all of the substantive issues raised on appeal can be reached by deciding the claims of the tribe alone, which did bring this action in the District court under Section 1362. *Id.,* at 425 U.S. 475, n. 14. The only case cited to this Court after substantial research by both sides, and which deals directly and squarely with the issue before this Court, is *Consolidated*

Freightways Corporation of Delaware v. Kassel, 730 F.2d 1139 (8th Cir. 1984). The same cases relied upon by plaintiffs in this case were effectively disposed of by the opinion and ruling in *Consolidated Freightways*. On October 1, 1984, certiorari was denied by the United States Supreme Court, ___ U.S. ___, 105 S.Ct. 126; and that ruling has been followed in the 7th Circuit in *Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 750 F.2d 608 (1984). The only federal courts dealing squarely with this issue having ruled that the Commerce Clause does not secure rights cognizable under Section 1983, this Court should do likewise.

As to Defendants' second proposition, the issue before this Court is not whether the Privileges and Immunities Clause, in the abstract, secures rights cognizable under 42 U.S.C. 1983. The question before this Court is whether Section 1983 may be invoked by plaintiffs for the sole purpose of claiming attorneys' fees and circumventing the remedies provided by state law. In oral argument and briefing on this point, it has been repeatedly asserted by Defendants, and never denied by Plaintiffs, that the sole reason for the inclusion of Count III in the petition was and is for the purpose of seeking attorneys' fees. With the exception of attorneys' fees, all the relief to which plaintiffs may be entitled in this case, and the procedure to obtain such relief, is provided for and governed by 68 O.S. 1981, §226, under which this action was brought. By the inclusion of Count III, Plaintiffs are merely trying to establish an independent right of action to recover attorneys' fees. In *Brown v. Hornbeck*, 458 A.2d 900 (1983), the Maryland court denied just such a claim. Further, in *Backus v. Chilivis*, 236 Ga. 500, 224 S.E. 2d 370

(1976), the Georgia Supreme Court ruled that where taxpayers had a plain, speedy and efficient remedy under state law to challenge ad valorem tax assessments, the plaintiffs could not avail themselves of a claim under Section 1983 to circumvent the remedies provided by state law. Similarly, in *Spencer v. South Carolina Tax Commission*, 316 S.E. 2d 386 (S.C. 1984), affirmed March 27, 1985, ___ U.S. ___, 53 L.W. 4431, the South Carolina Supreme Court, following the reasoning and ruling in *Chapman v. Houston Welfare Rights Organizations*, 441 U.S. 600, 99 S.Ct. 1905 (1979), and the rulings in *Backus*, supra, and *Brown*, supra, held that Section 1983, being remedial, does not provide for any substantive rights; that state remedies for asserting rights may not be circumvented by invoking Section 1983; and that where it could reasonably be inferred that the sole reason that taxpayers alleged Section 1983 in their suit challenging state tax statutes was to justify the allowance of counsel fees which were not provided for in the state law, the taxpayers would not be entitled to an award of attorneys fees under Section 1988.

Understandably, Plaintiffs do not agree with the cited cases, and would like this Court to ignore the rule of law announced therein. However, Plaintiffs cite no authority on this point, either in derogation of these rulings or in support of their position. Having been given the opportunity to cite to this Court authority in support of their position or in rebuttal to the cases cited by Defendants, Plaintiffs have failed to do so.

It should be noted that Oklahoma's statutory procedures for contesting the constitutional validity of this State's tax statutes, and for obtaining refunds of taxes

found to be unconstitutional, including 68 O.S. 1981, §226, have met the test in the federal courts, and have been found to provide a plain, speedy, and adequate remedy at law. *Bunte Candies, Inc. v. Cartwright*, 508 F. Supp. 229 (D.C.W.D. Okl.1981), *Cities Service Gas Company v. Oklahoma Tax Commission*, 656 F.2d 584 (10th Cir. 1981).

CONCLUSION

It is clear the Plaintiffs have totally failed in Count III to state a claim for which relief can be granted; that Count III asserts no substantial rights cognizable under 42 U.S.C. §1983; and that Count III was included for the sole purpose of attempting to claim attorneys' fees in circumvention of the state statutes under which this action was brought. Therefore, Count III of the Petition should be dismissed.

Respectfully submitted,

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General Counsel

By: /s/ Stanley Johnston
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of Defendants' Motion to Dismiss Count III was on this 27th day of June, 1985, delivered to William B. Rogers, Citizens Plaza, Suite 1060, 1601 Northwest Expressway, Oklahoma City, Oklahoma, 73118, Attorney for Plaintiffs; and mailed with sufficient postage prepaid to Jacob P. Billig, Richard A. Allen, David F. Smith, Billig, Sher & Jones, P. C., 2033 K Street, Northwest, Suite 300, Washington, D.C., 20006, Attorneys for Plaintiffs; Thomas L. Spencer, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105; Thomas G. Ferguson, Jr., James E. Walker, 6412 N. Santa Fe, P. O. Box 54526, Oklahoma City, Oklahoma, 73154, Attorneys for Intervenor; Wilburn L. Williamson, 50 Classen Center, Suite 107, 5101 N. Classen Boulevard, Oklahoma City, Oklahoma, 73118, Attorneys for Intervenor.

/s/ Stanley Johnston

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al., Plaintiffs	)	
v.	)	No. CJ-84-9902
STATE OF OKLAHOMA, et al. Defendants.	)	(Filed Mar. 4, 1987)
ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC., Intervenor.	)	

ORDER GRANTING JUDGMENT TO DEFENDANTS

This cause comes for disposition on the motion of the plaintiffs for summary judgment. The Court having considered the briefs, affidavits and documents submitted by the parties finds, for the reasons stated more fully in the Court's Memorandum decision issued on February 6, 1987:

1. That there are no disputed material issues of fact and that defendants are entitled to judgment as a matter of law;

2. That the taxes imposed pursuant to 68 O.S.A. § 607.1 and 47 O.S.A. § 22.5j(K) (now 47 O.S.A. § 1120(K)) do not violate the Commerce Clause or the Privileges and Immunities Clause of the United States Constitution; and

3. That Count III of the complaint asserting rights under 42 U.S.C. § 1983, fails to state a claim upon which relief can be granted and should be dismissed.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment seeking declaratory and injunctive

relief, refunds, costs and attorneys fees is denied, and it is

FURTHER ORDERED that final judgment in this cause shall be entered for the defendants pursuant to Rule 13.e of the Rules for District Courts of Oklahoma.

/s/ John M. Amick
DISTRICT JUDGE

March 3, 1987
Date

APPROVED AS TO FORM:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PRIVATE TRUCK COUNCIL OF AMERICA INC., et al.,	)	
Plaintiffs,	)	
v.	)	No. CJ-84-9902
STATE OF OKLAHOMA, et al.	)	
Defendants,	)	(Filed Mar. 6, 1987)
ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC.,	)	
Intervenor.	)	

ORDER

This cause came for hearing this 6th day of March, 1987 upon plaintiff's motion to settle the journal entry reflecting this court's previous ruling granting plaintiff's motion to certify the class under 12 O.S. Supp. 1987 §2023.

The court finds that the plaintiff's motion to certify the class was granted, and it furthermore finds that this action satisfies the prerequisites set forth in subsections (B)(1) and (B)(2) of 12 O.S. (1984 Supp.) §2023 of the Oklahoma Statutes and may therefore be maintained as a class action by the named plaintiffs for themselves and on behalf of and as representatives for all motor carriers whose vehicles are registered in states against which Oklahoma retaliates pursuant to 68 O.S. (Supp. 1987) §607.1 and 47 O.S. Supp. 1987 §1120(K) formerly §22.5j(K) and which are therefore subject to the tax imposed under those sections.

IT IS THEREFORE ORDERED that this action is certified as a class action under 12 O.S. Supp. 1987 §2023 (B)(1)(b) and (B)(2).

DATED this 6th day of March, 1987.

/s/ John M. Amick
District Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 28, 1991

Mr. Richard A. Allen
Zuckert Scoutt & Rasenberger
888 17th St., N. W., Suite 600
Washington, DC 20006

Re: National Private Truck Council, Inc., et al. v. Oklahoma Tax Commission, et al. No. 90-1597

Dear Mr. Allen:

The Court today entered the following order in the above entitled case:

The petitioner for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Oklahoma for further consideration in light of Dennis v. Higgins, 498 U. S. ___ (1991).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

Supreme Court of the United States

No. 90-1597

National Private Truck Council, Inc., et al.,

Petitioners,

v.

Oklahoma Tax Commission, et al.

ON WRIT OF CERTIORARI to the Supreme Court of Oklahoma.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Court of Oklahoma for further consideration in light of *Dennis v. Higgins*, 498 U.S. ___ (1991).

IT IS FURTHER ORDERED that the petitioners, National Private Truck Council, Inc., et al., recover from Oklahoma Tax Commission, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

June 28, 1991

Clerk's costs: $300.00

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Justices of the Supreme Court of Oklahoma,

GREETINGS:

WHEREAS, lately in the Supreme Court of Oklahoma, there came before you a cause between Private Truck Council of America, Inc., Circle W. Transportation, Inc., and Roy E. Griffis, On behalf of Themselves and all Others Similarly Situated, Appellants, and Oklahoma Tax Commission, et al., Appellees, and Associated Motor Carriers of Oklahoma, Inc., Intervenor, No. 68,401, wherein the judgment of the said Supreme Court was duly entered on the twenty-eighth day of June, 1990, as appears by an inspection of the petition for a writ of certiorari.

AND WHEREAS, in the 1990 Term, the said cause having been submitted to the **SUPREME COURT OF THE UNITED STATES** on the said petition for writ of certiorari, and the Court having granted the said petition.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 28, 1991, by this Court that the judgment of the above court in this cause was vacated with costs, and that this cause is remanded to the Supreme Court of Oklahoma for further consideration in light of *Dennis v. Higgins*, 498 U.S. ___ (1991).

IT IS FURTHER ORDERED that the petitioners, National Private Truck Council, Inc., et al., recover from

Oklahoma Tax Commission, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable **WILLIAM H. REHNQUIST**, Chief Justice of the United States, the – 30th – day of – July – in the year of our Lord one thousand nine hundred and ninety-one.

Costs of National Private Truck Council, Inc., et al.

Clerk's costs: $300.00

/s/ _____
Clerk of the Supreme Court
of the United States

No. 90-1597

National Private Truck Council, Inc., et al.

v.

Oklahoma Tax Commission, et al.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

NATIONAL PRIVATE TRUCK COUNCIL, INC, WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS, on behalf of themselves and all others similarly situated, Appellants, v. OKLAHOMA TAX COMMISSION, et al. Appellees, and ASSOCIATED MOTOR CARRIERS OF OKLAHOMA, INC., Intervenor.	No. 68,401 (Filed Jul. 20, 1992)

On Remand From the
United States Supreme Court

MOTION TO REMAND

On July 31, 1991 the United States Supreme Court vacated the decision of this Court as amended, reported at 806 P.2d 598 (Okla. 1991), and ordered that "this cause

is remanded to the Supreme Court of Oklahoma for further consideration in light of *Dennis v. Higgins*, 498 U.S. ___ (1991)." In *Dennis v. Higgins*, 498 U.S. ___, 112 L.Ed.2d 969, 111 S.Ct. 865 (1991), the United States Supreme Court held, contrary to this Court's decision in this case, that a State's violation of the Commerce Clause of the United States Constitution is actionable under 42 U.S.C. § 1983, with the result that prevailing plaintiffs are entitled to recover reasonable attorneys' fees from the defendants under 42 U.S.C. § 1988.

Following the United States Supreme Court's action, appellants[1] made several attempts to settle the remaining issues in dispute with appellees, the Oklahoma Tax Commission *et al.* (hereinafter, collectively, "Tax Commission"). Those efforts ultimately proved unsuccessful. Accordingly, appellants now move this Court to remand the case to the trial court for a resolution of those matters that remain, or may remain, in dispute: namely, the establishment of a plan of distribution of the taxes and accrued interest that this Court held must be refunded to the plaintiff class and a determination of the amount of attorneys' fees and litigation expenses appellants' attorneys should be paid under 42 U.S.C. § 1988 and the equitable "common fund" doctrine.

---

[1] Pursuant to a merger with another trade association of private motor carriers in August 1988 the original lead plaintiff, Private Truck Council of America, Inc., is now known as National Private Truck Council of America, Inc. Westinghouse Electric Corp. is the successor in interest to another named plaintiff, Circle W Transportation, Inc.

STATEMENT OF FACTS

This case has a long history. As set forth more fully in this Court's opinion, appellants filed this suit in December 1984 as a class action challenging the constitutionality of certain Oklahoma statutes that imposed retaliatory taxes and fees on out-of-state motor carriers operating in Oklahoma. Appellants filed a motion for summary judgment in February 1985.[2] On February 6, 1987 District Judge John Amick issued a brief opinion upholding the challenged taxes on the merits and denying appellants' motion. Appellants appealed to this Court.

On June 28, 1990 this Court issued an opinion reversing Judge Amick. The Court held: "The questioned statutes are plainly discriminatory" and thus violated the Commerce Clause under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 271, 279 (1977). 806 P.2d at 604. The Court stated: "Obviously . . . Oklahoma's retaliatory taxes do not pass the third and fourth prongs [of the *Complete Auto* test]." *Id.*

With respect to appellants' remedy, the Court held that appellants and the class they represent are entitled

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[2] Earlier, shortly after filing the complaint, appellants had moved for a preliminary injunction against collection of the taxes or, alternatively, for an order requiring that the taxes collected during the pendency of the suit be held in an escrow fund. After a hearing, District Judge William S. Myers, Jr. expressed the view that the plaintiffs would probably prevail in the case, but he denied the motion for preliminary injunction or escrow on the ground that the merits would probably be decided within 30 to 60 days. Judge Myers' prediction proved overly optimistic.

under 68 O.S. 1981 § 226 to a refund of the unconstitutionally collected taxes and fees plus interest at the statutorily prescribed rate. 806 P.2d at 606-608. However, although the Court had found the taxes "plainly discriminatory" and "obviously" unconstitutional under *Complete Auto* and many other Supreme Court decisions, it limited the refunds to which the plaintiff class were entitled to those that were "collected after June 23, 1987" (*id.* at 608-610), the date the United States Supreme Court had decided another truck tax case involving very different kinds of taxes, *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987).

The Court also denied appellants' separate claim for attorneys' fees under 42 U.S.C. § 1988, stating:

> Truckers also contend that they are entitled to attorneys fees as provided under 12 O.S. 1981 § 18(c) and 42 U.S.C. § 1988, including the costs of this action. Subsequent to Truckers' present action, the Oklahoma Legislature repealed § 18(c), with the adoption of this State's Pleading Code, 12 O.S. § 1101, *et seq.* Truckers cannot recover attorneys fees under a statute not applicable at the time they instituted this action, because they had no rights accrued thereunder.[50] Nor may Truckers recover attorneys fees under § 1988 for the adjudicated Commerce Clause violation.[51]

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[50] Okla. Const., Art. 5, § 54. See also *Gayman v. Mullen,* 58 Okla. 477, 161 P. 1051 (1916).

[51] *Consolidated Freightways Corp. of Delaware v. Kassel,* 730 F.2d 1139 (8th Cir. 1984); *Private Truck Council of America, Inc.* [*v. Sec'y of State*], 503 A.2d

214; *Private Truck Council of America, Inc. v. State of New Hampshire*, 517 A.2d 1150 (N.H. 1986); *State v. Private Truck Council of America, Inc.*, 371 S.E.2d 378 (Ga. 1988)

806 P.2d at 610.[3]

The Tax Commission then petitioned this Court for rehearing on the merits and also on the scope of the remedy. The Tax Commission pointed out that *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990), held that the *Scheiner* decision is to operate prospectively for *tax periods* occurring after the date of the decision without regard to when the tax was paid or collected.

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[3] In fact, appellants had never argued that they were entitled to attorneys' fees under 12 O.S. 1981 §18(c). Section 18(c), prior to its repeal, was a fee-shifting provision like 42 U.S.C. § 1988 which authorized recovery of plaintiff class attorneys' fees from the class action defendant. Although that provision was cited in the complaint as one basis for relief, it was not thereafter cited or argued in any brief to the district court or this Court. Instead, appellants argued that they were entitled to payment of attorneys' fees from the defendants under 42 U.S.C. § 1988 and also to payment from the common fund recovered for the class under the equitable "common fund" doctrine, which is well recognized in Oklahoma. *State ex rel Burk v. City of Oklahoma City*, 522 P.2d 612 (Okla. 1974); *Wewoka v. Banker*, 117 F.2d 839 (10th Cir. 1941) (applying Oklahoma law). *See* Brief in Chief of Appellants to the Oklahoma Supreme Court dated October 5, 1987 at pp. 28-29. Moreover, although the Tax Commission and the Attorney General disputed appellants' entitlement to fees under 42 U.S.C. § 1988, neither of them disputed that appellants would be entitled to payment of reasonable fees from a common fund if they recovered a fund for the class. This Court's opinion did not address the entitlement of plaintiffs' attorneys to fees from a common fund, but nothing in the opinion suggests that the common fund doctrine would not be applicable. Nor is there any reason it would not apply in this case, as it does in others.

Appellants opposed the petition for rehearing but agreed with the Tax Commission's point regarding the *Smith* case. On September 27, 1990 this Court issued a "Corrected Order" which amended the June 28, 1990 opinion to require refunds of all taxes collected "for the tax year 1987" and thereafter. Appellants and the Tax Commission then jointly petitioned for a further rehearing, pointing out that the term "the tax year 1987" was ambiguous and inappropriate in connection with the taxes at issue, some of which were assessed on the basis of three month periods, and others of which were assessed on the basis of twelve month periods commencing April 1 or July 1 of each year.[4] On March 5, 1991 the Court issued a further Order of Clarification which directed the Tax Commission to refund taxes paid "for tax periods or portions of tax periods occurring after June 23, 1987."

Appellants then filed a petition for a writ of certiorari with the United States Supreme Court, which sought review of two aspects of this Court's decision. First, it sought review of that part of the Court's decision limiting refunds to taxes for periods after June 23, 1987. Second, it sought review of this Court's ruling that Commerce Clause violations were not cognizable under 42 U.S.C. § 1983 and therefore that appellants were not entitled to attorneys' fees under § 1988. The latter ruling and the

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[4] In joining the Tax Commission in petitioning for rehearing to correct the ambiguity in the order, appellants made it clear that they believed that no limitation on the retroactive effect of the decision was appropriate and were in no way retreating from that position.

cases on which it relied, appellants argued, were squarely overruled by *Dennis v. Higgins*.

As noted at the outset, on July 31, 1991 the Supreme Court vacated this Court's decision and remanded the case to this Court for further consideration in light of *Dennis v. Higgins*. The Court's order made no reference to the other ground on which review had been sought.

ARGUMENT

Appellants submit that there is no need at this time for this Court's consideration of any issues, or the briefing of any issues to this Court. Instead, the Court should simply remand the case to the trial court for its consideration and resolution of the various issues remaining in dispute, inasmuch as the resolution of those issues will turn in large part on additional factual submissions. Any party dissatisfied with the district court's resolution of any of those issues may thereafter appeal to this Court.

The earlier decisions of this Court and the United States Supreme Court establish, appellants submit, the following propositions beyond dispute:

1. Appellants and the plaintiff class are entitled to refunds plus interest for all taxes paid by them for tax periods after June 23, 1987.

2. Appellants are also entitled to recover reasonable attorneys' fees and litigation expenses from the Tax Commission under 42 U.S.C. § 1988.

The latter proposition is clearly required by *Dennis* and other cases. It is now firmly established that plaintiffs

who are entitled to relief under 42 U.S.C. § 1983 are also entitled to recover their reasonable attorneys' fees and litigation expenses from the state defendant whether or not the plaintiffs might also have been entitled to, or obtained substantive redress on, other grounds. *See, e.g., Maher v. Gagne,* 448 U.S. 122, 132 n. 15 (1980); *Maine v. Thiboutot,* 448 U.S. 1,10-11 (1980). It is also settled that a state may not avoid this obligation on any ground based on state law or immunity or asserted good faith. *Howlett v. Rose,* 110 S.Ct. 2430 (1990); *Hutto v. Finney,* 437 U.S. 678, 693-700 (1978).

The issues that have not been resolved by the decisions of this Court and the United States Supreme Court and which remain to be resolved are as follows:

1. The precise procedures for refunding taxes and accrued interest to taxpayers, including the means of notifying taxpayers, requiring proofs of claims, the disposition of unrefundable amounts, etc.

2. The amount of reasonable attorneys' fees and litigation expenses that plaintiffs are entitled to be awarded from the Tax Commission under 42 U.S.C. § 1988 and from the common fund under the common fund doctrine.[5]

---

[5] A third unresolved issue concerns the entitlement of the plaintiff class to refunds of taxes for periods prior to June 23, 1987. This Court rejected appellants' claim for such refunds, but the Court's decision was vacated by the United States Supreme Court. Although that Court's order did not refer to the refund issue, the vacating of this Court's entire decision appears to leave that issue open. In the interest of terminating this litigation in some reasonable time frame, however, appellants have decided not to pursue that issue further.

With respect to the two issues that remain to be resolved, if the Court grants this Motion to Remand, appellants intend to promptly file with the district court a motion to approve a plan of distribution and a petition for an award of attorneys' fees and litigation expenses. The petition for fees and expenses will include affidavits and time and expense records of the attorneys, together with a memorandum of points and authorities concerning the pertinent legal principles. Appellants will also ask the trial court to order notice to be issued to members of the plaintiff class of the substance of the distribution plan and the fee petition, and to schedule a hearing on those matters at which any interested class member can appear and be heard.

CONCLUSION

The Court should remand this case to the District Court for Oklahoma County to determine an appropriate procedure for refunding taxes and interest to the plaintiff class and to determine and award reasonable attorneys' fees and litigation costs to appellants.

Respectfully submitted,

/s/ Richard A. Allen
Richard A. Allen
Richard P. Schweitzer
ZUCKERT, SCOUTT &
RASENBERGER
888 Seventeenth Street, NW
Suite 600
Washington, DC 20006-3959
202/298-8660

/s/ William B. Rogers
William B. Rogers
Three Chopt Square
6218 North Western, Suite 200
Oklahoma City, OK 73118

July 17, 1992

CERTIFICATE OF SERVICE

This is to verify that a true and correct copy of the above and foregoing Motion to Remand was mailed this 20th day of July, 1992, to the following counsel of record:

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/s/ William B. Rogers
William B. Rogers

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RICHARD A. ALLEN

October 8, 1992

James Patterson, Clerk
Supreme Court of Oklahoma
104 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: National Private Truck Council, et al. v. Oklahoma Tax Commission No. 68,401

Dear Mr. Patterson:

On July 20, 1992, the appellants filed a motion to remand this case to the District Court to establish a plan of distribution of tax refunds and accrued interest, and a determination of the amount of attorneys' fees.

No other party has opposed the requested remand, which we believe is plainly warranted. Accordingly, and because further delay in resolving this case is very prejudicial to the plaintiff class, we respectfully request expedited consideration of the motion to remand.

Sincerely,

/s/ Richard A. Allen
Richard A. Allen

RAA/kak

cc: Stanley Johnston, Esq.
William B. Rogers, Esq.
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RICHARD A. ALLEN

December 23, 1993

James Patterson, Clerk
Supreme Court of Oklahoma
104 State Capitol Building
Oklahoma City, Oklahoma 73105

Re: National Private Truck Council, Inc. et al. v. Oklahoma Tax Commission No. 68,401

Dear Mr. Patterson:

This letter is to draw the Court's attention to and make a further request for expedited consideration of the above-captioned case, which has been languishing before the Court for two and one-half years awaiting a purely ministerial act of remand to the District Court.

On June 28, 1991 the United States Supreme Court granted a writ of certiorari, vacated the judgment of this Court herein and remanded the case to this Court in light of the decision in *Dennis v. Higgins*, 498 U.S. ___, 111 S.Ct. 865 (1991). The effect of the U.S. Supreme Court's decision was to establish that plaintiffs are entitled to recover attorneys' fees under 42 U.S.C. § 1988, but otherwise to leave in place this Court's decision granting the plaintiff

taxpayers refunds of the motor carrier taxes that were the subject of this action.

Plaintiffs herein now seek to have the case remanded to the Oklahoma District Court solely for the purpose of petitioning for a distribution of those refunds and requesting an award of attorneys' fees. There are no other issues to be considered by this Court or the District Court.

Plaintiffs initially thought that this Court would automatically remand the case to the lower court. When that did not happen after one year from the Supreme Court's decision, plaintiffs filed a motion for remand in this Court on July 20, 1992. The Oklahoma Tax Commission did not file an opposition or any response whatsoever to that motion. When the Court still did not act, I sent a letter to you dated October 8, 1992 asking for expedited consideration of the unopposed motion.

Now, over fourteen months later, the Court still has not remanded the case to the District Court. The effect of this failure to act is to deny relief to the plaintiffs, as they are unable to obtain refunds of the taxes that this Court has declared unconstitutional. Again, the motion to remand is unopposed, and there are no legal issues for the Court to weigh. All we seek is the purely ministerial act of remanding the case to the trial court for purposes of carrying out the decisions of this Court and the U.S. Supreme Court.

I renew our request for expedited consideration of the motion to remand.

Sincerely,

/s/ Richard A. Allen
Richard A. Allen

RAA/kak

Supreme Court, U.S.
FILED
FEB 21 1995

No. 94-688

In The

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Proceedings Prior to this Court's Remand 4

B. This Court's Remand 9

C. The Decision Below 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. STATE COURTS ARE REQUIRED TO ENTERTAIN CLAIMS UNDER 42 U.S.C. §§ 1983 AND 1988 IN THE ABSENCE OF A "VALID EXCUSE" BASED ON NEUTRAL RULES OF COURT ADMINISTRATION 14

II. THE FEDERAL TAX INJUNCTION ACT AND "PRINCIPLES OF COMITY AND FEDERALISM" PROVIDE NO VALID EXCUSE TO STATE COURTS TO REFUSE TO ENTERTAIN CLAIMS AND PROVIDE RELIEF UNDER 42 U.S.C. §§ 1983 AND 1988 22

TABLE OF CONTENTS – Continued

Page

III. THE REASONS RELIED ON BY THE COURT BELOW ARE ALSO NOT A "VALID EXCUSE" BECAUSE THEY ARE INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT, 42 U.S.C. § 1988 AND WOULD NEGATE THE BASIC PURPOSE OF THAT ACT 31

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 29

Aldinger v. Howard, 427 U.S. 1 (1976) 28

Allison v. Board of County Comm'rs, 241 Kan. 266, 737 P.2d 6 (1987) 21

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 5, 8, 9, 10

American Trucking Ass'ns v. Secretary of Administration, 415 Mass. 337, 613 N.E.2d 95 (1993) 21

American Trucking Ass'ns v. Secretary of State, 595 A.2d 1014 (Me. 1991) 21

Arkansas Writers' Project, Inc. v. Ragland, 293 Ark. 395, 738 S.W.2d 402 (1987) 21

Bloomingdale's by Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), *cert. denied* ___ U.S. ___, 113 S. Ct. 3002 (1993) 21

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 34

Bung's Bar & Grille, Inc. v. Township of Florence, 206 N.J. Super. 432, 502 A.2d 1198 (1985) 21

Burrell v. Mississippi State Tax Commission, 536 So. 2d 848 (Miss. 1988) 21

City of Riverside v. Rivera, 477 U.S. 561 (1986) 32

Claflin v. Houseman, 93 U.S. 130 (1876) 15

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 8

Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) 9

TABLE OF AUTHORITIES – Continued

Page

Dennis v. Higgins, 498 U.S. 439 (1991) ..... *passim*

Dennis v. State, 234 Neb. 427, 451 N.W.2d 676 (1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991) 6

Douglas v. New York, N.H. & H. R. Co., 279 U.S. 377 (1929) 19

Edelman v. Jordan, 415 U.S. 651 (1974) 26

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 24, 31

Felder v. Casey, 487 U.S. 131 (1988) 18

Finley v. United States, 490 U.S. 545 (1989) 28

General Oil Co. v. Crain, 209 U.S. 211 (1908) 27

Glidden Co. v. Zdanok, 370 U.S. 548 (1962) 28

Herb v. Pitcairn, 324 U.S. 117 (1945) 19

Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197 (1991) 30

Howlett v. Rose, 496 U.S. 356 (1990) ..... *passim*

Hutto v. Finney, 437 U.S. 678 (1989) 21

Kentucky v. Graham, 473 U.S. 159 (1985) 21

Maher v. Gagne, 448 U.S. 122 (1980) 21

Maine v. Thiboutot, 448 U.S. 1 (1980) 32, 34, 35

Martinez v. California, 444 U.S. 277 (1980) 18

Marx v. Truck Renting & Leasing Ass'n, Inc., 520 So. 2d 1333 (Miss. 1987) 21

TABLE OF AUTHORITIES – Continued

Page

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 27

McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934) 17

Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 (1950) 19

Mondou v. New York, N.H. & H. R. Co., 223 U.S. 1 (1912) 16, 27

Murtagh v. County of Berks, 634 A.2d 179 (Pa. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1497 (1994) 21, 25

National Private Truck Council, Inc. v. Oklahoma Tax Commission, 501 U.S. 1247 (1991) 4

Neiman Marcus Group, Inc. v. Meehan, 1991 Conn. Super. LEXIS 2135 (1991) 21

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 33

Palmore v. United States, 411 U.S. 389 (1973) 15, 27

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 18

Pechiney Corp. v. Crystal, 43 Conn. Supp. 91, 643 A.2d 319 (Conn. Super. Ct. 1994) 21, 25, 27, 28

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 24

Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n, 879 P.2d 137 (Okla. 1994) 2

Private Truck Council of America, Inc. v. Oklahoma Tax Commission, 806 P.2d 598 (Okla. 1991) 2

TABLE OF AUTHORITIES – Continued

Page

Private Truck Council v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986) 6

Private Truck Council v. State, 128 N.H. 466, 517 A.2d 1150 (1986) 6

Private Truck Council v. State, 221 N.J. Super. 89, 534 A.2d 13 (1987) *aff'd en banc*, 111 N.J. 214, 544 A.2d 33 (1988) 6

Radio Common Carriers of New York, Inc. v. State, 601 N.Y.S.2d 513 (Sup. Ct. 1993) 21

Riverton Produce Co. v. State, 871 P.2d 1213 (Colo. 1994) 21

Rosewell v. La Salle Nat'l. Bank, 450 U.S. 503 (1981) 24

Rowan Cos., Inc. v. State Tax Commission, 623 So. 2d 159 (La. App. 1993) 21

Smith v. Robinson, 468 U.S. 992 (1984) 21

State Dep't of Revenue v. Private Truck Council, 531 So. 2d 367 (Fla. Dist. Ct. App. 1988) 6

State ex rel. Burk v. Oklahoma City, 522 P.2d 612 (Okla. 1973) 9, 34

State v. Private Truck Council, 258 Ga. 531, 371 S.E.2d 378 (1988) 6

State v. Quill, 500 N.W.2d 196 (N.D.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 173 (1993) 11

Tafflin v. Levitt, 493 U.S. 455 (1990) 17

Testa v. Katt, 330 U.S. 386 (1947) 15, 17, 27

TABLE OF AUTHORITIES – Continued

Page

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 20

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

Commerce Clause of the United States Constitution, Article I, Section 8 ..... *passim*

Privileges and Immunities Clause of the United States Constitution, Article IV, Section 2 7

Supremacy Clause of the United States Constitution, Article IV, Section 2 14

Amendment XI, United States Constitution .. 4, 24, 26, 30

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1331 27

28 U.S.C. § 1341 ..... 3, 4, 11, 22

28 U.S.C. § 1342 ..... 27, 28

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

OKLA. STAT. tit. 12 § 18(c) (1981) 9

OKLA. STAT. tit. 47 § 1120(K) (1986) 3

OKLA. STAT. tit. 68 § 607.1 (1982 Supp.) 3

LEGISLATIVE HISTORY

2569 CONG. REC. 1415-1417 (1937) 23

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) 33

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937) 23

S. Rep. No. 1011, 94th Cong. (1976) 32

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No. 94-688

In The

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,[1]

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.[2]

On Writ Of Certiorari To The Supreme Court of Oklahoma

BRIEF OF PETITIONERS

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[1] National Private Truck Council, Inc. is a trade association and has no subsidiaries. It is the successor to the Private Truck Council of America, Inc., one of the original plaintiffs in this action. The non-wholly owned subsidiaries of Westinghouse Electric Corporation are listed at Pet. App. 62a.

[2] Respondents are the Oklahoma Tax Commission and the following members of the Commission: Robert E. Anderson, Chairman; Robert V. Cullison, Vice Chairman; and Don Kilpatrick, Secretary-Member. The individual respondents are successors in office to other officials whom petitioners had sued in their official capacities for declaratory and injunctive relief.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court (Pet. App. 1a-23a) is reported in *Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n.*, 879 P.2d 137 (Okla. 1994).

An earlier opinion of the Oklahoma Supreme Court (Pet. App. 24a-27a), which was vacated and remanded by this Court "for further consideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)," is reported at 806 P.2d 598 (Okla. 1991).

The opinion of the district court of Oklahoma County (Pet. App. 48a-53a) is not reported. The decision of the district court of Oklahoma County denying petitioners' motion for a preliminary injunction or escrow is set forth at Pet. App. 54a-58a.

JURISDICTION

This case is before the Court on writ of certiorari to review a decision of the Oklahoma Supreme Court entered on July 19, 1994. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

42 U.S.C. § 1983 (1994) provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 (1994) provides in pertinent part:

In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

28 U.S.C. § 1341 (1993) provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent provisions of Oklahoma's retaliatory tax statute, Okla. Stat. tit. 47, § 1120(K) (1986) and tit. 68, § 607.1 (1982 Supp.), are set forth at Pet. App. 59a.

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STATEMENT OF THE CASE

Petitioners successfully challenged a state truck tax as violating their rights under the Commerce Clause of the United States Constitution. In the decision under review, the Supreme Court of Oklahoma has, for the second time, held that these petitioners are not entitled to federal remedies under 42 U.S.C. §§ 1983 and 1988 notwithstanding this Court's action in vacating and remanding the first decision denying such relief "for further consideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)." *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 501 U.S. 1247 (1991).

A. Proceedings Prior to this Court's Remand

This case has a long and tortuous history. Over ten years ago, on December 17, 1984 petitioners filed a class action suit in Oklahoma state court challenging the constitutionality of certain "retaliatory taxes" that the State of Oklahoma imposed on motor carriers who operated in Oklahoma trucks that were registered in certain other states. J.A. 17. Petitioners filed the case in Oklahoma state court because they assumed that the state courts would provide them with a "plain, speedy and efficient remedy" and because access to federal court for injunctive and declaratory relief was barred by the Tax Injunction Act, 28 U.S.C. § 1341, and for monetary remedies by the Eleventh Amendment. More than ten years later, that expectation has fallen somewhat short of fulfillment.

The challenged taxes were not imposed on trucks registered in Oklahoma. Pet. App. 27a-28a, 59a. The

purpose of these taxes was to retaliate against states imposing so-called "third structure taxes,"[3] which certain states have imposed on all motor carriers operating in those states, including Oklahoma-registered carriers, and to which the Oklahoma legislature objected. These statutes carried out this purpose by authorizing respondents to impose taxes on carriers whose vehicles are operated in Oklahoma but are registered in states that impose third structure taxes. These retaliatory taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third-structure tax states, Oklahoma's legislature hoped to pressure the legislatures of those states to repeal their third-structure taxes or to exempt Oklahoma-based carriers from them.

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[3] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first structure" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Oklahoma and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

Respondents implemented these statutes in 1983 by imposing retaliatory taxes on carriers with trucks operating in Oklahoma that were registered in 25 states.[4]

Petitioners are the National Private Truck Council, Inc. ("NPTC"), Westinghouse Electric Corporation, and Roy Griffis. NPTC is the national trade association of "private carriers" – companies that own and operate their own truck fleets primarily in furtherance of their non-transportation businesses. NPTC is the successor to the Private Truck Council of America, Inc., which was the original lead plaintiff in this suit and in six other suits which successfully challenged retaliatory taxes imposed by other states.[5] Westinghouse Electric Corporation is the successor to the rights of its former subsidiary Circle W Transportation, which operated 15 Pennsylvania-registered trucks in Oklahoma and therefore paid $1,080 in retaliatory taxes to Oklahoma in 1984. Roy Griffis is an

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[4] These are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Nevada, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[5] *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council v. State*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council v. State*, 221 N.J. Super. 89, 534 A.2d 13 (1987) *aff'd en banc*, 111 N.J. 214, 544 A.2d 33 (1988); *State v. Private Truck Council*, 258 Ga. 531, 371 S.E.2d 378 (1988); *State Dep't of Revenue v. Private Truck Council*, 531 So. 2d 367 (Fla. Dist. Ct. App. 1988); *Dennis v. State*, 234 Neb. 427, 451 N.W.2d 676 (1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991). All of these retaliatory tax cases, including the case before the Court, were brought by NPTC and its members on a contingent fee basis with counsel.

unincorporated "owner operator" residing in Bearden, Arkansas. Griffis paid $185 in retaliatory taxes to Oklahoma in 1984. Pet. App. 25a.

Petitioners' complaint alleged that Oklahoma's retaliatory tax statutes discriminated on their face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983. The complaint sought declaratory and injunctive relief, refunds of taxes paid and attorneys fees under state law and 42 U.S.C. § 1988. Upon filing the complaint, petitioners moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.

Although the trial court acknowledged that the taxes were probably unconstitutional, it denied petitioners' motion for a preliminary injunction against their collection, or alternatively, for an order requiring them to be held in escrow because it felt that the merits of the action could be promptly decided. Pet. App. 54a-55a, 58a.[6] Petitioners then promptly filed a motion for summary judgment. Two years later, another judge of the same court

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[6] Judge Myers of the District Court of Oklahoma County denied the plaintiffs' motion for preliminary injunction or escrow because he thought the merits would be decided within "thirty to sixty days, considering the speed with which such matters are decided." Pet. App. at 58a. Ten years later, that prediction has proved to be unduly optimistic.

finally ruled on that motion, denying it and upholding the constitutionality of the taxes. Pet. App. 48a-53a.

Petitioners appealed to the Oklahoma Supreme Court. More than three years later, on June 28, 1990, that court issued a decision reversing the trial court's decision upholding the taxes. Pet. App. 24a-47a. The court held, "The questioned statutes are plainly discriminatory" and thus violate the Commerce Clause under the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *Id.* at 34a-35a. The court stated: "Obviously . . . Oklahoma's retaliatory taxes do not pass the third and fourth prongs [of the *Complete Auto* test]." *Id.* at 35a.

With respect to a remedy, the court held that petitioners and the class they represent are entitled under the pertinent Oklahoma tax refund statute to recover refunds of unconstitutional taxes on a class-wide basis. Pet. App. 47a. However, the court ruled that its holding would operate "quasi-prospectively from the date of the [*American Trucking Ass'ns v.] Scheiner* decision," – *i.e.*, from June 23, 1987.[7] As corrected by two subsequent orders, the court's final opinion remanded with directions to respondents to refund taxes paid with respect to tax periods occurring after June 23, 1987.

The Oklahoma Supreme Court also briefly addressed and rejected petitioners' claim under 42 U.S.C. § 1983 and

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[7] *Id.* at 42a, 46a. The court noted: "Nearly $12,000,000 was collected under the statutes from April, 1983 [when they were first implemented] through October, 1987." Pet. App. 39a. Presumably somewhat less was collected with respect to the tax period prior to June 23, 1987.

their associated claim for attorney's fees under 42 U.S.C. § 1988. It did so on the basis of *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) and other decisions (App. 46a), all of which this Court overruled in *Dennis v. Higgins*.[8]

B. This Court's Remand

Petitioners filed a petition for a writ of certiorari to review two aspects of the Oklahoma Supreme Court's decision: its denial of refunds of taxes paid with respect to the period before the *Scheiner* decision and its denial of petitioners' claims under 42 U.S.C. §§ 1983 and 1988. Petitioners pointed out that the denial of their claims under §§ 1983 and 1988 conflicted directly with this Court's decision in *Dennis v. Higgins*. In *Dennis*, which involved the challenge by NPTC and others to Nebraska's retaliatory truck tax on the same Commerce Clause ground asserted in this case, the Court held that the taxpayer's Commerce Clause claims were cognizable under § 1983. The Court stated that § 1983 "provides a remedy, to be broadly construed, against all forms of

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[8] Petitioners had also argued to the trial court and the Oklahoma Supreme Court that they were entitled to an award of attorneys fees from the fund of refunds recovered for the class under the common fund doctrine which was well established under Oklahoma law, as it is in other states and in federal law. *State ex rel. Burk v. Oklahoma City*, 522 P.2d 612 (Okla. 1973). The Oklahoma Supreme Court in its decision did not address petitioners' claim for common fund fees, but instead stated that petitioners were not entitled to fees under a repealed state fee shifting statute, Okla. Stat. tit. 12, § 18(c) (1981) – a contention that petitioners had never argued. (Pet. App. 46a).

official violation of federally protected rights." 498 U.S. at 445. With respect specifically to the challenge to Nebraska's truck taxes, the Court held: "We conclude that the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983." *Id.* at 451.

On July 31, 1991 this Court issued an order in which it summarily vacated the judgment of the Oklahoma Supreme Court and remanded the case to that court "for further reconsideration in light of *Dennis v. Higgins*, 498 U.S. 439 (1991)." 501 U.S. 1247.

C. The Decision Below

After several unsuccessful attempts to resolve outstanding issues with respondents, petitioners on July 20, 1992 filed a motion with the Oklahoma Supreme Court to remand the case to permit the trial court to establish a plan of distribution of tax refunds and accrued interest[9] and to determine petitioners' attorneys fees and litigation expenses. Respondents filed no opposition or other response to that motion.

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[9] While this case is pending on the question of § 1983 relief, the Oklahoma Tax Commission retains over $5 million in principal and interest that is due for refund to taxpayers pursuant to the Oklahoma Supreme Court's decision of June 28, 1990. The Tax Commission also retains nearly $12 million in Oklahoma retaliatory taxes that, although "clearly" unconstitutional according to the same decision, are not subject to refund because they were collected for tax periods prior to this Court's decision in *American Trucking Ass'ns v. Scheiner*.

On February 24, 1994 the Oklahoma Supreme Court *sua sponte* issued an order directing the parties to file briefs addressing various issues related to petitioners' entitlement to attorneys' fees. Pet. App. 60a-61a. After receipt of briefs from the parties, the court issued a decision holding that "plaintiffs are not entitled to relief under §§ 1983 and 1988." *Id.* at 6a.

The court below concluded that "principles of comity and federalism" supported its view that petitioners are not "entitled to assert federally created remedies under §§ 1983 and 1988 in this state court action." Pet. App. 6a. The court reasoned that the policies of the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining state taxes where "a plain, speedy and efficient remedy may be had in the courts of such State," authorize state courts to refuse to provide federal remedies established by §§ 1983 and 1988 to litigants challenging state taxes in state courts. *Id.* at 6a-9a. The court also relied on a decision of the North Dakota Supreme Court in *State v. Quill*, 500 N.W.2d 196 (N.D.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 173 (1993) to the same effect.

Although the court acknowledged that the Tax Injunction Act only applies to federal courts, it justified its decision on the basis of "principles of comity." Pet. App. 8a. One of these principles, according to the court, "is that potential differences in remedies available in state court and federal court should be avoided. The existence of such differences encourages forum shopping." *Id.*

The court also asserted that its decision was not contrary to this Court's decision in *Dennis v. Higgins*, because, it said, this Court in *Dennis* had not addressed

the effect of the Tax Injunction Act on the availability of remedies under §§ 1983 and 1988 in state tax cases (although it noted that the dissenting opinions in *Dennis* had cited the Tax Injunction Act). Pet. App. 7a. For similar reasons the court rejected petitioners' reliance on *Howlett v. Rose*, 496 U.S. 356 (1990). *Id.* at 8a.

Accordingly, the court reinstated its earlier judgment without change. Pet. App. 11a.[10]

SUMMARY OF ARGUMENT

The holding below that state courts are not required to apply and enforce claims arising under 42 U.S.C. §§ 1983 and 1988 conflicts with the principle, long-established in this Court's decisions, that state courts must entertain causes of action arising under federal law. This Court has consistently held that under the Supremacy Clause state courts have an obligation to apply and enforce federal law as the "Supreme Law of the Land." In doing so, the Court has specifically rejected the argument that a state court may refuse to hear a federal claim because the rights or remedies involved conflict with state policy. Moreover, state courts may not discriminate against rights arising under federal laws.

[10] The court also held that petitioners' claim of entitlement to attorney's fees under the state law common fund doctrine was barred by its earlier opinion and the law of the case doctrine (Pet. App. 10-11a), even though its earlier opinion had never addressed petitioners' entitlement to fees and expenses under the common fund doctrine.

This basic principle that state courts must entertain federal claims also applies to claims under 42 U.S.C. §§ 1983 and 1988. In cases arising under § 1983, this Court has held that a state court may not refuse to entertain a federal claim absent a "valid excuse," and that an excuse that is inconsistent with or violates federal law is not a valid excuse. States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

The principle of federal court noninterference in state tax matters underlying the Tax Injunction Act does not constitute a valid excuse for a state court to refuse to hear a federal claim involving state taxes. The Tax Injunction Act limits the jurisdiction of federal courts, not state courts. Furthermore, allowing state courts to hear § 1983 claims challenging state taxes implements the policies of both § 1983 and the Tax Injunction Act. Under the Tax Injunction Act, federal courts are precluded from hearing state tax claims *because* those claims may be heard in state court.

Additionally, the comity consideration arising from the Tax Injunction Act is not a neutral rule of state court procedure. Nor is the desire of the court below for exact uniformity in federal and state court jurisdiction. There are many instances where federal courts cannot hear claims cognizable in state courts because federal courts are courts of limited jurisdiction and state courts are normally courts of general jurisdiction.

Finally, the reasons of the court below are not a valid excuse to refuse to hear federal claims because those reasons are inconsistent with the principles of the Civil

Rights Attorney's Fees Act, which provides for attorney's fees to successful plaintiffs in *all* actions enforcing rights under § 1983. There is nothing in the language or legislative history of the Act to suggest that a state may refuse to follow its provisions in state tax cases. This Court has determined that attorney's fees under § 1988 are an integral part of the remedies necessary to obtain compliance with § 1983, and are available whether such an action is brought in federal or state court. The refusal of the court below to hear petitioners' claims under §§ 1983 and 1988 denies them a remedy granted by Congress.

ARGUMENT

I. STATE COURTS ARE REQUIRED TO ENTERTAIN CLAIMS UNDER 42 U.S.C. §§ 1983 AND 1988 IN THE ABSENCE OF A "VALID EXCUSE" BASED ON NEUTRAL RULES OF COURT ADMINISTRATION.

The Supreme Court of Oklahoma held that state courts are not required to apply and enforce federal law, namely 42 U.S.C. §§ 1983 and 1988, in cases where federal courts are precluded by jurisdictional statutes from applying and enforcing that law. That novel proposition finds no support in any federal statute, and it conflicts with fundamental principles of federalism well-established by this Court's opinions.

This Court has long made clear that, in our constitutional system, state courts have an obligation under the Supremacy Clause, Article IV, § 2, to apply and enforce federal law as the "Supreme Law of the Land." This obligation is concurrent with and independent of the

obligation of federal courts to enforce federal law. State courts would have that obligation even if there were no lower federal courts at all. Indeed, before 1875, federal courts had no general federal-question jurisdiction and very limited original jurisdiction of any kind. As the Court observed in *Palmore v. United States*, 411 U.S. 389, 401 (1973): "Until that time, the state courts provided the only forum for vindicating many important federal claims."

Even before the Constitution was ratified, Alexander Hamilton, in urging its adoption, stated that it would impose on state courts a concurrent and independent obligation to apply and enforce federal law. In *The Federalist No. 82* (E. Bourne ed. 1947), at 132, he wrote: "[T]he inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

Although before the Civil War the scope of the obligation of state courts to apply federal law was sometimes questioned (*see Testa v. Katt*, 330 U.S. 386, 390 (1947)), the Court took occasion in 1876 to endorse Hamilton's view unequivocally. In *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876), the Court stated:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of

> the same country, having jurisdiction partly different and partly concurrent.

The Court went on to state that if Congress provides a cause of action to a party, "there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." *Id.* at 137.

The Court has reaffirmed this basic principle many times in the intervening 120 years. For example, in *Mondou v. New York, N.H. & H. R. Co.*, 223 U.S. 1 (1912), this Court held that when Congress creates a federal cause of action and vests enforcement jurisdiction in federal courts, that fact does not support the inference that Congress intended to make federal court jurisdiction exclusive. Nor does it permit state courts of general jurisdiction to refuse to exercise jurisdiction over federal causes of action. In *Mondou*, the Connecticut courts had refused to enforce a claim under the Federal Employers' Liability Act; it reasoned both that the Congress had impliedly excluded a state court remedy, and that in any event the substantive principles of the FELA were not in accord with state policy. This Court concluded that Congress had not excluded state court jurisdiction, and that state courts had an obligation to enforce the federal right regardless of state policy considerations:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissable, because it presupposes what does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that

> act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

223 U.S. at 57. *See also McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), where a state court declined jurisdiction over a FELA claim because it arose under federal law. In *McKnett*, this Court reversed on the ground that denial of jurisdiction based "solely on the source of the law sought to be enforced" violated the rule that a state court may not "discriminate against rights arising under federal laws." 292 U.S. at 233-34.

In *Testa v. Katt*, the Court again applied this principle to require state courts to enforce federal remedies that were contrary to state policy. In *Testa*, the Rhode Island courts refused to enforce a claim for treble damages for selling an automobile above the ceiling price established under the Emergency Price Control Act. The state court refused to enforce the federal remedy because it was "penal" and "foreign in the international sense" to the state. This Court held that state courts "are not free to refuse enforcement" of a federal right, including the treble damage remedy; the Court stated that "the obligation of states to enforce these federal rights is not lessened by reason of the form in which they are cast or the remedy which they provide." 330 U.S. at 391. More recent cases applying the same principle include *Tafflin v. Levitt*, 493 U.S. 455 (1990) (requiring state enforcement of the civil RICO statute, 18 U.S.C. §§ 1961-1968) and *Yellow Freight*

System, Inc. v. Donnelly, 494 U.S. 820, 823 (1990) (requiring state court enforcement of 42 U.S.C. § 2000e *et seq.*).

This Court has also consistently applied this principle to hold that state courts are required to apply and enforce federal rights and remedies under 42 U.S.C. §§ 1983 and 1988. In *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 506-507 (1982), for example, the Court noted that the framers of the Civil Rights Act of 1871 intended that suits under § 1983 could be brought in either federal or state courts. The Court has also held that state courts may not refuse to enforce federal claims under §§ 1983 and 1988 on the basis of state law policies or procedures that are in conflict with the policies and purposes of the federal statutes. *Felder v. Casey*, 487 U.S. 131 (1988) (rejecting defense based on state notice-of-claim and exhaustion-of-remedies requirements); *Martinez v. California*, 444 U.S. 277 (1980) (rejecting defense based on state official immunity statute).

The Court summarized the governing principles as they apply to § 1983 claims in *Howlett v. Rose*, 496 U.S. 356 (1990). In *Howlett*, the Court held that Florida courts could not reject a plaintiff's § 1983 claim on the basis of a sovereign immunity defense under state law. The Court reaffirmed the fundamental principle that

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and the laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.

Id. at 367. The Court then set out three corollaries of concurrent jurisdiction arising from the Supremacy Clause principle that federal law is the Supreme Law of the Land.

First, "[a] state court may not deny a federal right when the parties and controversy are properly before it, in the absence of a 'valid excuse.' " 496 U.S. at 369 (quoting from *Douglas v. New York, N.H. & H. R. Co.*, 279 U.S. 377, 387-388 (1929)). Second, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse." *Howlett*, 496 U.S. at 371.

Third, state courts will normally be permitted to refuse to entertain a federal claim when such refusal is based on "a neutral rule regarding the administration of the courts. . . . " 496 U.S. at 372. Thus, "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* The Court noted that it has found state procedural rules to constitute valid excuses for not entertaining federal claims on only three occasions: when neither party was a resident of the forum state, *Douglas v. New York, N.H. & H. R. Co.*, 279 U.S. 377 (1929); when the cause of action arose outside the state court's territorial jurisdiction, *Herb v. Pitcairn*, 324 U.S. 117 (1945); and when the state court invoked *forum non conveniens* to bar adjudication, *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950). *Howlett*, 496 U.S. at 374-75. In each of these cases, the rule in question was neutral, applying equally to bar federal and state law causes of action. Furthermore, in each case, the refusal of the state courts to entertain the federal claims did not preclude the claimants from enforcing their federal rights in some court. They were able to bring

those claims either in a federal court or in another more appropriate state court.

The decision below is squarely in conflict with the foregoing decisions. The Oklahoma Supreme Court has refused to apply and enforce federal rights and remedies under §§ 1983 and 1988 without any "valid excuse." As we discuss more fully in the following sections, the Tax Injunction Act and the "principles of comity and federalism" invoked by that court do not provide any valid excuse for the refusal of a state court to enforce federal law. The Tax Injunction Act is simply inapplicable, and the "principles of comity and federalism" as used by that court is not a neutral rule of judicial administration. The rule fashioned by the court below serves only to bar federal claims under §§ 1983 and 1988, and it effectively precludes claimants from enforcing their rights under those statutes in any challenge to a state tax on federal grounds in any court. As such, it is plainly inconsistent with those federal laws.[11]

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[11] Neither the court below nor respondents have disputed petitioners' right to seek and obtain relief under §§ 1983 and 1988 on any ground other than the Tax Injunction Act and the principles of comity invoked by the court below. Inasmuch as petitioners' complaint sought injunctive and declaratory relief from respondent commissioners acting in their official capacities, this Court's decisions make clear that the complaint stated claims under §§ 1983 and 1988 on which relief could be granted. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, n.10 (1989). The fact that injunctive and declaratory relief was granted under state procedures is immaterial to their entitlement to attorney's fees under § 1988. Since petitioners would have been entitled to injunctive and declaratory relief under § 1983, they are entitled to recover their attorney's fees and costs

Contrary to the Supreme Court of Oklahoma, the large preponderance of state courts that have considered this issue have correctly concluded that they are required to apply and enforce claims under §§ 1983 and 1988 in state court actions challenging the validity of state taxes and tax enforcement practices on federal constitutional or statutory grounds.[12]

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under § 1988. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980). Furthermore, § 1988 requires an award of attorney's fees and costs unless there are special circumstances that would make such a recovery unjust. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984). Moreover, the obligation of the states or agencies whom the respondent commissioners represent to pay attorney's fees is not subject to defenses of sovereign immunity or good faith execution of the challenged state law or practice. *Hutto v. Finney*, 437 U.S. 678 (1978); *Kentucky v. Graham*, 473 U.S. 159, 164-67 (1985).

[12] *See Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1497 (1994); *Riverton Produce Co. v. State*, 871 P.2d 1213 (Colo. 1994); *American Trucking Ass'ns v. Secretary of Admin.*, 415 Mass. 337, 613 N.E.2d 95 (1993); *Bloomingdale's by Mail v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992); *cert. denied* ___ U.S. ___, 113 S. Ct. 3002 (1993); *American Trucking Ass'ns v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 863-64 (Miss. 1988); *Marx v. Truck Renting & Leasing Ass'n, Inc.*, 520 So. 2d 1333 (Miss. 1987); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Pechiney Corp. v. Crystal*, 43 Conn. Supp. 91, 643 A.2d 319 (Conn. Super. Ct. 1994); *Rowan Cos., Inc. v. State Tax Comm'n*, 623 So. 2d 159 (La. Ct. App. 1993); *Radio Common Carriers of New York, Inc. v. State*, 601 N.Y.S.2d 513 (Sup. Ct. 1993); *Neiman Marcus Group, Inc. v. Meehan*, 1991 Conn. Super. LEXIS 2135 (1991); and *Bung's Bar and Grille, Inc. v. Township Council of Florence*, 206 N.J. Super. 432, 457-62, 502 A.2d 1198, 1213-16 (1985).

II. THE FEDERAL TAX INJUNCTION ACT AND "PRINCIPLES OF COMITY AND FEDERALISM" PROVIDE NO VALID EXCUSE TO STATE COURTS TO REFUSE TO ENTERTAIN CLAIMS AND PROVIDE RELIEF UNDER 42 U.S.C. §§ 1983 AND 1988.

The Oklahoma Supreme Court explained its denial of petitioners' claims under 42 U.S.C. §§ 1983 and 1988 by reasoning that the claims could not have been brought in federal court under the Tax Injunction Act, 28 U.S.C. § 1341, and therefore principles of "comity and federalism" allow the Oklahoma courts to refuse to hear these claims in state court. Pet. App. 6a. There is no merit to the reliance by the court below on the Tax Injunction Act and principles of comity and federalism. Indeed, such reliance to excuse state courts from entertaining and enforcing federal rights and remedies in state tax cases turns that Act and those principles on their heads.

The sole purpose of the Tax Injunction Act was to prevent the *federal* judiciary from interfering with state tax procedures when state law provides adequate state procedures for addressing the claims. The Act's language says nothing about the jurisdiction of *state* courts, or whether state courts should entertain federal causes of action.

Nor does the legislative history of the Tax Injunction Act contain any indication of the slightest intent by Congress to limit the authority or obligation of state courts to enforce all federal rights in cases challenging state taxes and tax practices. What that history indicates is that the Congress wanted to preserve the ability of states to continue collecting tax revenues during litigation over the

validity of state taxes, and to prevent federal courts from interfering with those collections. The Tax Injunction Act was in response to a perceived practice of out-of-state corporate taxpayers qualifying for diversity jurisdiction in federal court and then obtaining preliminary injunctions of the tax collection while their cases were pending. By enjoining state tax collection, federal courts imposed a financial burden on state and local governments and forced taxing authorities to accept reduced tax payments in lieu of protracted litigation. *See* 2569 CONG. REC. 1415 (1937).

Additionally, the Tax Injunction Act was intended to resolve an anomaly whereby nonresident state taxpayers received more favorable treatment in court than residents. Nonresident taxpayers could qualify for diversity jurisdiction in federal courts to challenge state taxes while resident taxpayers were required to resort to state courts. *Id.* at 1416-1417. Under the laws of most states, taxpayers challenging state taxes were obligated to pay the tax first and then sue for a refund. *See* S. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937). Eliminating federal court jurisdiction where state court remedies were adequate provided equal treatment for residents and nonresidents challenging state tax laws.

Lastly, Congress passed the Tax Injunction Act to establish state courts as the primary forum for challenging state taxes because most suits arose from state law, and this Court was available to review any state court decisions involving federal grounds for challenging state taxes. 2569 CONG. REC. 1417 (1937).

None of these congressional purposes justifies a state court's refusal to entertain a federal claim. Although this Court has reversed the decisions of federal courts asserting jurisdiction in § 1983 cases when the state court remedies were "plain, speedy and efficient," *see Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981), this Court has never indicated that a *state* court could choose not to hear those same § 1983 claims because its state law remedies were adequate. Indeed, the Court in *Fair Assessment* specifically noted that "the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." 454 U.S. at 116. Similarly, in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 122 (1984), the Court observed that, because of the limitations that the Tax Injunction Act and the Eleventh Amendment impose on federal courts in state tax matters, "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . must be brought in state court."

More important, in this case there is no concern of federal court interference with state tax procedures involving requests for preliminary injunctions, declaratory relief or damages. Petitioners brought their action in state court, and the Oklahoma Supreme Court declared the state taxes to be in violation of the federal Constitution and ordered refunds and interest. The federal courts were not involved in this proceeding to any extent, and thus the reasons that preclude federal court consideration of a state tax claim under § 1983 are inapposite here.

The Tax Injunction Act therefore provides no reason for state courts not to entertain and provide relief under §§ 1983 and 1988. As one state court judge has explained:

> These concerns of comity, however, in no way foreclose state courts from hearing § 1983 actions in conjunction with state tax appeals. Neither the letter nor the spirit of [the Tax Injunction Act] are violated by the existence of such state court jurisdiction. This jurisdiction, in fact, fully implements the policies of *both* § 1983 (*i.e.*, the vindication of civil rights) and § 1341 (*i.e.*, the noninterference of federal courts in state tax matters) in a way that federal jurisdiction does not.

Pechiney Corp. v. Crystal, 643 A.2d 319, 321 (Conn. Super. Ct. 1994). *See also Murtagh v. County of Berks*, 634 A.2d 179, 185 (Pa. 1993), in which the Pennsylvania Supreme Court squarely rejected the argument that prohibitions imposed on federal courts in the Tax Injunction Act and principles of comity against enjoining state taxes justified *state* courts in refusing to enforce federal remedies:

> [T]he principle of comity that causes a federal court to refrain from exercising jurisdiction over section 1983 tax assessment cases has no relevance to a class action challenging, in state court, the constitutionality of a system of property tax assessment.

In fact, the Oklahoma Supreme Court's reliance on the Tax Injunction Act turns that Act on its head. The Tax Injunction Act is premised on the proposition that federal courts are unnecessary *because* state courts are available to enforce federal rights and remedies. The court below,

however, used the Act as an excuse for state courts to refuse to consider federal claims and remedies.

In addition, as noted earlier, the Tax Injunction Act is not a "neutral state rule of court administration," *Howlett*, 496 U.S. at 371, like *forum non conveniens*, applicable alike to federal and state claims. As applied by the Oklahoma Supreme Court, the Act would be a non-neutral rule that acts only to bar federal claims. Furthermore, the ruling below would effectively abolish the rights and remedies of taxpayers under §§ 1983 and 1988 in states like Oklahoma, because taxpayers could not bring suits under those sections challenging state taxes in federal or state court. There is no indication in the language or legislative history of the Tax Injunction Act, either expressed or implied, that Congress intended to repeal any existing federal rights and remedies in directing tax plaintiffs to state courts.

Moreover, the desire of the court below for "uniformity" in result between federal and state courts in § 1983 state tax claims provides no justification for its result. A desire for "uniformity" is not the kind of "neutral" rule that would provide a valid excuse under *Howlett* to deny hearing a federal claim in state court. The Tax Injunction Act itself, upon which the court below relies, prevents uniformity of result between federal and state courts.[13]

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[13] Taken to its logical extreme, the desire for uniformity of result between federal and state courts would have precluded the Oklahoma courts from hearing the petitioners' Commerce Clause claims for refunds as well, because those claims could not have been brought in federal court under the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974). Surely those

In addition, there are many other instances where federal courts lack jurisdiction to enforce federal rights which are enforceable in state courts, and where there is therefore no "uniformity" between remedies obtainable in state and federal courts. As Judge Blue pointed out in *Pechiney Corp.*, 643 A.2d at 321, "it is not at all anomalous for state courts to have jurisdiction over matters that federal courts cannot lawfully adjudicate." For example, until the Judiciary Act of 1875, Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until then, the state courts provided the only forum for vindicating many important federal claims. *See Palmore v. United States*, 411 U.S. 389, 401-02 (1973); *see generally* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure*, § 2.3 (2d ed. 1993). Even following the creation of general federal question jurisdiction in 1875, codified at 28 U.S.C. § 1331, until 1980 that statute contained an amount in controversy provision, so that federal causes of action involving lesser amounts in controversy could be heard only in state courts.

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federal constitutional claims are no less a burden on the state "remedial scheme" than the statutory claims. Yet the Oklahoma courts willingly heard those Commerce Clause claims and ultimately granted declaratory and injunctive relief and refunds of taxes paid, as they were required to do. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *General Oil Co. v. Crain*, 209 U.S. 211, 228 (1908). This points out that the principles of "comity" and "federalism" espoused by the court below are merely a pretext for not providing the federally required remedy of attorney's fees. A state court may not refuse to entertain a federal claim because the state disagrees with the federal policy, however. *Howlett*, 496 U.S. at 371; *Testa*, 330 U.S. at 392; *Mondou*, 223 U.S. at 57.

Congress continues to limit the jurisdictional power of federal courts. For example in addition to the Tax Injunction Act, the Johnson Act, 28 U.S.C. § 1342, prohibits federal courts from issuing injunctions regarding state public utility rate orders where certain requirements are met.[14] This jurisdictional limitation, of course, does not mean that Johnson Act plaintiffs have no federal rights in state courts.

Under Article III, § 1, Congress may grant, or withdraw, jurisdiction from the federal courts as it sees fit. *Finley v. United States*, 490 U.S. 545, 548 (1989); *Glidden Co. v. Zdanok*, 370 U.S. 548, 551 (1962). Accordingly, some lack of uniformity is inherent in our federal system and in the fact that federal courts are courts of limited jurisdiction and state courts are normally courts of general jurisdiction. *Pechiney Corp. v. Crystal*, 643 A.2d at 321, (*citing Aldinger v. Howard*, 427 U.S. 1 (1976)). The court below, however, seems to believe that state courts should be clones of federal courts. That result is neither possible nor desirable in our federal system.

Moreover, the statement of the court below that providing state court jurisdiction over § 1983 state tax claims would encourage "forum shopping" by taxpayers (Pet. App. 8a) is patently absurd. Forum shopping is only possible when there is a choice of potential forums. The

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[14] The requirements precluding federal court jurisdiction under the Johnson Act are jurisdiction based on diversity or a federal constitutional claim, noninterference with interstate commerce, reasonable notice and hearing by the utility, and a plain, speedy and efficient remedy in state court. 28 U.S.C. § 1342.

Tax Injunction Act eliminates the possibility of a federal forum, leaving the state court of general jurisdiction as the only alternative for a state tax claim under 42 U.S.C. § 1983. There can be no forum shopping when there is only one possible forum.

In contrast, adopting the reasoning of the court below will necessarily lead to a nonuniform result among state courts. Allowing state courts to decline jurisdiction over § 1983 claims will result in state court jurisdiction over federal rights being available only in those states that accept jurisdiction over such claims.[15] There is nothing in the language or history of 42 U.S.C. § 1983 indicating that Congress intended its provisions to apply to state tax cases in some states but not in others. "Federal legislation applies in all States, and in cases of conflict between federal law and the policies purportedly underlying some state regulatory schemes, the scope of federal law is not curtailed." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990).[16]

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[15] See n. 12, *supra*.

[16] This Court has also rejected attempts by state courts to avoid federal remedies in other circumstances. In *Adams Fruit Co. v. Barrett*, the Court unanimously rejected the defendant's "reverse" pre-emption argument that would authorize states to withdraw federal remedies by establishing state remedies as exclusive. There the defendants argued that Florida courts could not hear federal claims under the Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.* because state worker's compensation laws were the exclusive remedy. This Court ruled that "[s]uch provisions cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme." *Id.* The Court added, "That Congressional authorization of a federal remedy may

Finally, contrary to the opinion of the court below, the obligation of state courts to entertain § 1983 claims in state tax cases and to provide attorneys' fees to prevailing plaintiffs under § 1988 was implicit in this Court's opinion in *Dennis v. Higgins*, 498 U.S. 439 (1991). The *Dennis* case involved facts and a procedural history identical to this case. In both cases, a group of motor carrier plaintiffs challenged a state retaliatory truck tax under the Commerce Clause and under 42 U.S.C. §§ 1983 and 1988. Both cases were brought in state court, and the state courts each granted relief on the constitutional claim but not on the federal statutory claim.

This Court reversed the denial of the federal statutory claim, and stated that "the Supreme Court of Nebraska erred in holding that petitioner's claim could not be brought under 42 U.S.C. § 1983." 498 U.S. at 451. That holding certainly would seem to require state courts to entertain such claims. If they could refuse to do so, little would be left of the Court's holding that persons could bring such claims in state court.

Furthermore, the Court in *Dennis* was clearly aware that the Tax Injunction Act prevented bringing the suit in federal court.[17] Although the Court in *Dennis* did not

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affect the balance struck in state remedial schemes does not suggest that Congress intended its provisions to be effective only in certain States." *Id. See also Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197 (1991) (state courts are required to entertain FELA cases against the state where similar suits are barred in federal court by the Eleventh Amendment).

[17] The respondent's brief in *Dennis* argued that if this Court found that the Commerce Clause did support a claim under

address the effect of the Tax Injunction Act or principles of comity on state court jurisdiction, it was certainly aware of those arguments and correctly chose to ignore them.[18] There is nothing in the *Dennis* opinion suggesting that state courts could refuse to hear § 1983 claims in state tax cases.

III. THE REASONS RELIED ON BY THE COURT BELOW ARE ALSO NOT A "VALID EXCUSE" BECAUSE THEY ARE INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT, 42 U.S.C. § 1988 AND WOULD NEGATE THE BASIC PURPOSE OF THAT ACT.

The "principles of comity and federalism" relied on by the court below are not a "valid excuse" for the

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§ 1983 that the Court should remand the case to the Nebraska Supreme Court to determine whether a state court must hear a § 1983 claim in a state tax case. Resp. Br. at 45-49. Respondent argued that the policy of federal court noninterference in 28 U.S.C. § 1341 and the principle of comity, as explained in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), had led a number of state courts to decline jurisdiction over § 1983 claims in state tax suits. *Id.* The Court, however, did not accept this suggestion. Instead, it held unequivocally that "the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983," and it remanded the case "for further proceedings not inconsistent with this opinion." After that remand, the Nebraska Court awarded attorney's fees and costs to Mr. Dennis and his attorneys.

[18] Justice Kennedy's dissent recognized that the majority's holding creating a right cognizable under the Commerce Clause in § 1983 state tax actions would necessarily require a grant of attorney's fees to the successful plaintiffs. 498 U.S. at 463-65.

further reason that they are inconsistent with federal law. As the Court held in *Howlett v. Rose*, 496 U.S. at 371, any excuse that is "inconsistent with or violates federal law is not a valid excuse." Specifically, the reasons given by the court below are inconsistent with the requirements of the Civil Rights Attorney's Fees Award Act of 1976, now codified at 42 U.S.C. § 1988, and with Congress' basic purpose in enacting that statute.

The basic Congressional purpose in enacting § 1988 was to ensure that all persons who are required to resort to legal action to vindicate their federal rights, when those rights are infringed by persons acting under color of state law, can recover the costs of those actions, including reasonable attorneys' fees. As one commentator has noted: "The adoption of a fee-shifting statute for § 1983 and other civil rights actions is part of a trend moving away from the 'American Rule' under which parties are responsible for their own fees." 2 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 22.4 (1994).

In *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980), this Court held that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983. S. Rep. No. 94-1011, p. 5 (1976)." Congress enacted § 1988 in recognition of the fact that parties who bring suit under § 1983 and prevail are typically seeking to redress not only their own injuries but also to vindicate important civil and constitutional rights of many other people and the public at large. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). As the House Report accompanying § 1988 noted, a person who obtains injunctive relief under § 1983 " 'does so not for himself alone but also as a 'private attorney general,'

vindicating a policy that Congress considered of the highest importance." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Section 1988 thus reflects Congress' awareness that the monetary damages resulting from state deprivations of federal rights will often not be large enough to make it feasible for persons, or even groups of persons, to bear the expense of litigation to vindicate those rights unless they and their attorneys can recover those expenses if they prevail. Accordingly, the ability of plaintiffs and their attorneys to recover litigation costs and attorneys' fees is often essential to the effective protection of their federal rights.

These facts are no less true in the case of state tax exactions that contravene federal rights. Because the monetary damage resulting from unconstitutional taxation is often relatively small on an individual basis, compared to the costs of litigation, the availability of attorneys' fees can make the difference between protecting the federal rights of taxpayers and allowing violations to go unredressed. *See* William L. Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 417 (1985).

In this case, for example, it is most unlikely that petitioner National Private Truck Council, Inc. or any of its individual member companies would have been willing to undertake the costs, including attorney's fees, of over ten years of litigation to secure the tax refunds that

ultimately will be returned in this case.[19] Petitioners were able to retain counsel on a contingent fee basis because there was a reasonable prospect of recovering attorney's fees in the event of success. If the decision below is sustained, it is unlikely that attorneys would be willing to undertake cases like this one, even with very good prospects of success, on a contingent fee basis.[20]

From the perspective of state officials, including state legislators, the knowledge that the expense of litigation is likely, as a practical matter, to immunize most constitutionally questionable taxes and tax enforcement practices from court challenge can only encourage overreaching.

In *Maine v. Thiboutot*, the Court not only observed that the fees authorized by § 1988 were an "integral part of the remedies necessary to obtain compliance with

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[19] For example, the two taxpayer petitioners in this case paid nominal amounts in retaliatory taxes to the Oklahoma Tax Commission. In 1984, petitioner Westinghouse Electric Corporation paid $1,080.00 in challenged taxes. Petitioner Roy W. Griffis paid only $185.00 in taxes in 1984. Pet. App. 25a.

[20] In this regard, it is also noteworthy that the court below held that petitioners and their attorneys were not able to recover fees under the equitable common fund doctrine from the tax refunds that will be paid to the plaintiff class, even though that doctrine had appeared to be as well established in Oklahoma as it is elsewhere. *State ex rel. Burk v. Oklahoma City*, 522 P.2d 612 (Okla. 1973). *See also, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). The result of the decision below on future cases of this kind in Oklahoma, therefore, will be to require the named litigants to bear the entire cost of litigation themselves, even if they are successful. As a practical matter, this will preclude persons from access to the courts to vindicate their federal rights in all cases except those involving very large monetary injuries.

§ 1983," but it also held that attorneys "fees are available in *any* § 1983 action," not just those involving traditional "civil rights" type cases. 448 U.S. at 9 (emphasis in original). Specifically, the Court held that § 1988 applied to the § 1983 action in that case, which was a case seeking redress for deprivations of federal *statutory* rights under the Social Security Act.

Certainly there is nothing in the language or legislative history of § 1988 to indicate that it was not intended to apply to one, relatively narrow, category of actions to protect federal rights – namely, those challenging state taxes that infringe federal rights. If Congress wishes to create such an exception to the scope of § 1988, it is free to do so, but there is no warrant for this Court to engraft such an exception onto the statute.

Finally, the Court in *Maine v. Thiboutot* squarely held that § 1988 applied to § 1983 actions brought in state courts. The Court stated:

> Several States, participating as *amici curiae*, argue that even if § 1988 applies to § 1983 claims alleging deprivations of statutory rights, it does not apply in state courts. There is no merit to this argument. . . . It follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court.

448 U.S. at 10-11. Significantly, the Court also pointed out that if fees under § 1988 were not available in state court actions, then in those cases where federal courts lack jurisdiction to hear the § 1983 claims (*e.g.*, because of insufficient jurisdictional amounts), "some plaintiffs would be forced to go to state courts, but, contrary to

congressional intent, would still face financial disincentives to asserting their claimed deprivation of federal rights." *Id.* at 11 n.12.

In sum, the reasons offered by the court below for declining to entertain petitioners' claims under § 1983 and their claim for attorney's fees under § 1988 are clearly inconsistent with a provision that is an integral part of the federal remedies under § 1983.

CONCLUSION

The decision of the Oklahoma Supreme Court should be reversed and the case remanded so that the District Court of Oklahoma County may entertain petitioners' application for attorney's fees and costs under 42 U.S.C. § 1988.

Respectfully submitted,

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In the
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October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Where a "plain, speedy and efficient remedy" is available under state law for Commerce Clause or other Constitutional or federal law challenges to state tax laws, are the state courts, in view of the principles of federalism and comity, *required* by federal law to entertain a coextensive claim under 42 U.S.C. §§ 1983, asserted solely for the purpose of claiming attorney fees pursuant to § 1988?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

ADDITIONAL STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. IN STATE TAX CHALLENGES, STATE COURTS ARE NOT REQUIRED TO IMPOSE FEDERAL REMEDIES PURSUANT TO 42 U.S.C. §§ 1983 AND 1988 WHEN A "PLAIN, SPEEDY AND EFFICIENT" REMEDY MAY BE HAD UNDER STATE LAW. 6

A. Congress Has Drastically Limited Federal Interference In The Administration of State Taxation When A "Plain, Speedy And Efficient" State Remedy Is Available. 8

B. Oklahoma Provides A "Plain, Speedy And Efficient Remedy." 12

II. NEITHER THE SUPREMACY CLAUSE NOR THIS COURT'S DECISIONS REQUIRE THE STATE TO GRANT ADDITIONAL REMEDIES UNDER § 1988 IN STATE TAX CHALLENGES.. 16

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

PAGE

CASES

Boise Artesian Water Co. v. Boise City,
213 U.S. 276 (1909) 10

California v. Grace Brethren Church,
457 U.S. 393 (1982) 11,17

Chapman v. Houston Welfare Rights Organization,
441 U.S. 600 (1979) 14

Cities Service Gas Co. v. Oklahoma Tax Comm'n,
656 F.2d 584 (10th Cir.), *cert. denied*,
454 U.S. 1124 (1981) 13

Dennis v. Higgins, 498 U.S. 439 (1991) 3

Dows v. City of Chicago,
78 U.S. (11 Wall.) 108 (1871) 9

Ex Parte Young, 209 U.S. 123 (1908) 16

Fair Assessment in Real Estate Ass'n v. McNary,
454 U.S. 100 (1981) ..... *passim*

Great Lakes Dredge & Dock Co. v. Huffman,
319 U.S. 293 (1943) 10

Hudson v. Palmer, 468 U.S. 517 (1984) 14

Kentucky v. Graham, 473 U.S. 159 (1985) 16,18

Lynch v. Household Finance Corp.,
405 U.S. 538 (1972) 9

Matthews v. Rodgers, 284 U.S. 521 (1932) 10

TABLE OF AUTHORITIES (cont'd)

PAGE

CASES (CONT'D)

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) 13

Monroe v. Pape, 365 U.S. 167 (1961) 8,9

Oklahoma Tax Commission v. Harris, 126 P.2d 685 (Okla. 1942) 6,7,17

Oklahoma Tax Commission v. Smith, 610 P.2d 794 (Okla. 1980) 12

Parratt v. Taylor, 451 U.S. 527 (1981) 14

Perez v. Ledesma, 401 U.S. 82 (1971) 11

Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n, 806 P.2d 598 (1991) ... 6

Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n, 879 P.2d 137 12,13

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 11,14,15

Singer Sewing Machine Co. v. Benedict, 229 U.S. 481 (1913) 10

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 10

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 16,17

TABLE OF AUTHORITIES (cont'd)

PAGE

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 3 2
U.S. Const. art. VI, cl. 2 8
28 U.S.C. § 1341 ..... *passim*
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1988 ..... *passim*
OKLA. STAT. tit. 12, §§ 1651 *et seq.* (1981) 2
OKLA. STAT. tit. 68, §§ 201 *et seq.* (1981) 12
OKLA. STAT. tit. 68, § 221 12
OKLA. STAT. tit. 68, § 225 13
OKLA. STAT. tit. 68, § 226 (1981) ..... *passim*

OTHER

Robert L. Stern, et al., *Supreme Court Practice* 250 (7th ed. 1993) 4

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NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENTS

ADDITIONAL STATUTORY PROVISIONS

In addition to the Constitutional and statutory provisions cited by Petitioners, the following state statute is involved:

OKLA. STAT. tit. 68, § 226 (1981), which creates a right of action to afford a remedy to any taxpayer who wishes to challenge any state tax or its collection or enforcement, where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of

the Federal Constitution, is set out in full in the Appendix to this Brief, at 1a.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) initially brought this action in state district court pursuant to OKLA. STAT. tit. 68, § 226 (1981) to recover taxes paid under protest, which taxes plaintiffs charged were violative of the Commerce Clause.[1] The plaintiffs' Petition invoked the state court's jurisdiction pursuant to § 226 and OKLA. STAT. tit. 12, §§ 1651 *et seq.* (1981) (Declaratory Judgments Act). J.A. 20. In Count III of their state court petition, plaintiffs alleged that the actions of the defendants[2] in collecting the taxes imposed by the challenged statutes were "taken under color of state law," and that defendants, Respondents here, were therefore "liable to plaintiffs pursuant to 42 U.S.C. § 1983."[3] J.A. 25. In their prayer for relief, plaintiffs sought attorney fees under state law and 42 U.S.C. § 1988. J.A. 26.

Defendants argued in favor of the statutes' constitutionality, and also challenged the plaintiffs' claim for

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] The original defendants were the State of Oklahoma, the Oklahoma Tax Commission, the Commissioners of the Tax Commission, both individually and in their official capacities, and the State Treasurer. The action was later dismissed as to the State, the State Treasurer, and the Tax Commissioners as individuals.

[3] No specific damages or relief were sought under § 1983 in the petition, either in the form of declaratory or injunctive relief, or as refunds. Those remedies were available, and invoked, under state law, *ie.*, 68 O.S. § 226.

attorney fees in a two-fold argument: (1) that a § 1983 claim could not be brought on Commerce Clause grounds; and (2) that a § 1983 claim is not cognizable in state court where a complete and adequate remedy (such as 68 O.S. 1981, § 226) is provided under state law to redress the plaintiffs' substantive claim.

The trial court upheld the tax statutes' constitutionality under the Commerce Clause, and also dismissed plaintiffs' § 1983 claim. That dismissal was based upon the court's conclusion that the Commerce Clause would not support a claim under § 1983.

On appeal, the Oklahoma Supreme Court reversed the trial court as to the constitutionality of the taxing statutes, holding them violative of the Commerce Clause, and ordered partial refunds.[4] That court agreed, however, that plaintiffs were not entitled to attorney fees, also upon the grounds that, under then extant jurisprudence, a § 1983 claim could not be maintained on Commerce Clause grounds. As with the trial court, although the existence and adequacy of the state-law remedy as grounds for dismissal of a § 1983 claim had been briefed and argued by the Oklahoma Attorney General and by the Tax Commission,[5] that issue was not addressed in the Oklahoma court's opinion.

Subsequent to the Oklahoma Supreme Court's decision on June 28, 1990, this Court ruled in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865 (1991), that suits for violations of the Commerce Clause *may* be brought under § 1983. As a result, on plaintiffs' petition for certiorari, the Court

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[4] 806 P.2d 598 (Okla. 1990).

[5] See, *eg.*, J.A. at 57–60.

vacated the Oklahoma Supreme Court's opinion and remanded for further consideration in light of *Dennis*.[6]

On remand, the Oklahoma court recognized this Court's holding in *Dennis*, and acknowledged that, pursuant thereto, Commerce Clause violations do indeed provide a basis for the bringing of a § 1983 action. 879 P.2d at 138, 140, Pet.App. 1a, 5a. The court, however, went on to examine the pertinent issue of this case, which was not involved in *Dennis*: Are the state courts *required* to entertain such actions where, as here, a "plain, speedy and efficient remedy" is available—and invoked—under state law?

The Oklahoma court first found that Oklahoma law provides an adequate state remedy affording the relief the plaintiffs requested. 879 P.2d at 138, 139, Pet.App. 1a, 4a. Consequently, under the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, a federal court would be prohibited from entertaining Petitioner-plaintiffs' claim. *Id.*, at 138, Pet.App. 2a–3a. Thus that court, while acknowledging that state courts have *jurisdiction* to consider § 1983 claims, found that the determinative issue in this case was whether, under principles of federalism and comity, the state courts were required to *exercise* that jurisdiction when tax challengers could receive constitutionally adequate relief under state law. *Id.*, at 140–142, Pet.App. 6a–11a. After reviewing the decisions and rationale both of this Court and of those state court decisions which

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[6] In issuing such a summary reconsideration order, this Court told the Oklahoma court to reconsider the case "in light of the intervening precedent—which may or may not compel a different result." Robert L. Stern, et al., *Supreme Court Practice* 250 (7th ed. 1993).

considered *that* question—and those which did not—the court held that, under those principles, the exercise of such jurisdiction was not required under these circumstances. *Ibid.*

Accordingly, the court below found that plaintiff-petitioners had been afforded a plain, speedy and efficient remedy under state law which was adequate for 14th Amendment due process purposes, and that this Court's decision in *Dennis v. Higgins*, under these circumstances, did not compel a different result in this case. As the court said, "[a]lthough the reasons for so doing have changed," the trial court (and the Oklahoma Supreme Court) "reached the right result in declining to grant an attorneys' fee under §§ 1983 and 1988." *Id.*, at 142, Pet.App. 10a–11a. The prior judgment was reinstated. *Ibid.*

As will be shown, that decision is consistent with applicable decisions of this Court, the Constitution, and the mandates of Congress regarding the enforcement of state tax laws. The decision below should be affirmed.

SUMMARY OF THE ARGUMENT

No action, claim or remedy is or was necessary under 42 U.S.C. § 1983 to vindicate Petitioners' rights under the Commerce Clause in this case, or to award them the tax refunds they sought. All of their remedies, which were adequate and complete, were and are provided by state law. In such a case, Congress' intent and policy, as manifested by 28 U.S.C. § 1341, is one of nonintrusion and noninterference. Petitioners' argument, therefore, that the state court's refusal to grant additional remedies under federal law is in conflict with the policies and purposes of the federal statutes, is simply untenable. The Court's decisions have well established that where state laws

provide taxpayers a complete and adequate remedy, one that is "plain, speedy and efficient," the intent and policy of Congress is that those taxpayers should be remitted solely to those state remedies. That is what was done in this case. The decision below is not in conflict with federal policy; rather, it preserves and follows it. The decision should be affirmed.

ARGUMENT

I

IN STATE TAX CHALLENGES, STATE COURTS ARE NOT REQUIRED TO IMPOSE FEDERAL REMEDIES PURSUANT TO 42 U.S.C. §§ 1983 AND 1988 WHEN A "PLAIN, SPEEDY AND EFFICIENT" REMEDY MAY BE HAD UNDER STATE LAW.

The State of Oklahoma, though the provisions of OKLA. STAT. tit. 68, § 226 (1981), provides an "all-in-one" legal remedy to taxpayers who contend that a state tax or its enforcement constitutes an unlawful burden on interstate commerce, or otherwise violates any of the Acts of Congress or the United States Constitution. *Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n*, 806 P.2d 598, 606–607 (1991). This section, which provides a specific right of action and remedy for state tax challenges, authorizes taxpayers to pay the complained-of taxes under protest and to file suit for their recovery where, if successful, the taxpayer may obtain a declaration of the tax statute's constitutional invalidity,[7] preclude future collec-

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[7] The statute itself does not provide for either declaratory or injunctive relief. App. 1a. And the Oklahoma court has held that a taxpayer may not maintain an action solely to enjoin the collection of a tax. *Oklahoma Tax Commission v. Harris*, 126 (continued...)

tion of those taxes, and obtain a refund of the protested taxes paid, with interest. *Id.*

In this case, Petitioners brought just such an action in state court under § 226 to challenge certain state taxes imposed on motor carriers. The state statute, however, does not authorize attorneys' fees. Therefore, although Petitioners could obtain full redress for their complaints under state law, they appended to their state court petition a claim that the imposition of the tax "deprived" them of rights secured by the Constitution, and that the Respondents were therefore "liable" pursuant to 42 U.S.C. § 1983. Accordingly, although there was no relief or "liability" to be granted under § 1983—a complete remedy being provided by the state statute—Petitioners asked for attorneys' fees pursuant to 42 U.S.C. § 1988.

Petitioners' basic argument in support of their quest for attorneys' fees is that Congress, in enacting 42 U.S.C. §§ 1983 and 1988, has mandated that all remedies available under those federal laws must also be made available in state court actions challenging state taxes, even when the state-law remedy is "plain, speedy and efficient." As will be seen, however, there is no such mandate, and Respondents submit that Congress never intended such a result.

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[7](...continued)
P.2d 685 (Okla. 1942). However, in order to find the taxpayer entitled to a refund under 68 O.S. § 226, the court must necessarily declare that the offending tax is unconstitutional or violative of federal law. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 115 (1981).

A. *Congress Has Drastically Limited Federal Interference In The Administration of State Taxation When A "Plain, Speedy And Efficient" State Remedy Is Available.*

The basis of Petitioners' argument is that 42 U.S.C. § 1983, being an Act of Congress, is a part of the Supreme Law of the Land,[8] and that the state courts are therefore obligated to provide all remedies that might be available in an action brought thereunder, regardless of the remedies that are available under state law. This argument, however, is nothing more than an attempt to rely upon and to reinstate, in state tax challenges, the following language from *Monroe v. Pape*, 365 U.S. 167, 183 (1961):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved.[9]

However, the doctrine originating in *Monroe v. Pape* is unavailing to Petitioners here, for two reasons: first, it is taken out of context; and second, it has long been repudiated by the Court where state tax challenges are concerned.

In *Monroe v. Pape* the Court pointed out that Section 1 of the Ku Klux Act of 1871, 17 Stat. 13, from whence comes § 1983, had three main aims: (1) it might, of course, override certain state laws; (2) it provided a remedy where state law was inadequate; and (3) it was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Monroe*, 365 U.S. at 173–174. Thus, recognized the Court:

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[8] U.S. Const. art. VI, cl. 2.

[9] See Petitioners' Reply to Brf. in Opp., at 3.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state Agencies.

Id., at 180. Accordingly, it was in this light—that the evil sought to be addressed was the inadequacy of state remedies or, more often, the inability or unwillingness of state agencies and officers to enforce state laws—that the Court advanced the doctrine that comity, a respect for state laws, did not apply where § 1983 is involved.

That situation does not pertain here. Oklahoma does provide a remedy to redress challenges to its tax laws, and that remedy is enforced and effective—just as it was in this case. And in the area of state tax administration, Congress has expressed a policy of noninterference.

The Court has recognized that "Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly . . . ." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n. 6 (1972). Shortly before Congress enacted § 1983 to provide a federal remedy and forum where state laws were inadequate to protect citizens' rights under the Constitution, the Court "recognized the importance and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102 (1981), and in *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), the Court held that a suit in equity will

not lie in the federal courts to restrain or enjoin the collection of an unconstitutional state tax where the taxpayer had an adequate remedy at law. As Justice Field wrote for the Court:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Id., at 110.[10]

As the Court observed in *Fair Assessment*, § 1983 cut a "broad swath." 454 U.S. at 103. However, "Congress also recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Id.*, at 102–103. Thus, in 1937 Congress passed the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

This Act, which "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976), was "first and foremost a vehicle to limit drastically federal

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[10] *See also, Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Matthews v. Rodgers*, 284 U.S. 521 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276 (1909).

district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981).

As the Court observed in *California v. Grace Brethren Church*, 457 U.S. 393, 409 n. 22 (1982), "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration."[11] These principles and the Congressional intent and policy embodied in the Tax Injunction Act "reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment*, 454 U.S. at 103. Accordingly, the Court held that where the "broad swath" of § 1983 comes into contact with Congress' policy of noninterference with state tax remedies, "the principle of comity controls." *Id.*, at 105. Accordingly, the Court held:

> Therefore, despite the ready access to federal courts provided by *Monroe* and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights *by state remedies*, provided

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[11] *See also, Perez v. Ledesma*, 401 U.S. 82, 128, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part).

> of course that those remedies are plain, adequate and complete[12] . . . .

Id., 454 U.S. at 116 (Emphasis added). Oklahoma's remedies for challenging its taxes meet the test established by the Court and mandated by Congress.

B. *Oklahoma Provides A "Plain, Speedy And Efficient Remedy."*

Under Oklahoma's Uniform Tax Procedure Code, OKLA. STAT. tit. 68, §§ 201 *et seq.* (1981), taxpayers have several remedies available by which to challenge the State's tax laws or their enforcement. See generally, *Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n*, 879 P.2d 137, 145–146, Pet. App. at 17a–21a (Wilson, J., dissenting). In a case where a taxpayer fails to report and pay, or underreports and underpays, the Oklahoma Tax Commission may issue a proposed assessment and the taxpayer may protest the same and demand an administrative hearing before the Commission before payment of the tax.[13] OKLA. STAT. tit. 68, § 221. If the taxpayer is aggrieved by the Commission's decision on his protest, he may pay the proposed assessment under protest (or post a

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[12] As the Court noted, there is no significant difference between remedies that are "plain, adequate and complete" and those which are "plain, speedy and efficient" within the meaning of § 1341. "Both phrases refer to the obvious precept that plaintiffs seeking protection of federal rights in federal courts *should be remitted to their state remedies* if their federal rights will not thereby be lost." *Fair Assessment*, 454 U.S. at 116, n. 8 (emphasis added).

[13] If the tax has not yet become due, an Oklahoma taxpayer may maintain a declaratory judgment action to challenge the validity of a tax statute on its face. *Oklahoma Tax Commission v. Smith*, 610 P.2d 794 (Okla. 1980).

bond), and appeal the Commission's order directly to the Oklahoma Supreme Court. OKLA. STAT. tit. 68, § 225. If the taxpayer is successful on appeal, the taxes, penalties or interest so paid shall be refunded, with interest. *Ibid.*

In addition to the right to protest taxes in administrative hearings before the Tax Commission, with the right of judicial review by the state supreme court, the taxpayer has a further remedy where the taxes are said to violate federal laws or the Constitution. In such a case, as was done here, the taxpayer may pay the taxes proposed to be assessed, under protest, and file suit in the state district court for their recovery. OKLA. STAT. tit. 68, § 226. Again, if the taxpayer prevails, by final judgment or on appeal, the amounts paid are refunded, with interest. *Ibid.*

These administrative and judicial remedies provide the taxpayer with a full hearing and the opportunity for judicial review, during which all constitutional objections can be raised, and provide taxpayers a "plain, speedy and efficient remedy" for challenging state taxes, as defined in *Rosewell*. *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584 (10th Cir. 1981), *cert. denied*, 454 U.S. 1124. Further, the state remedies provide both predeprivation and postdeprivation remedies with "meaningful relief" as described in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). *See, Private Truck Council*, 879 P.2d at 147, Pet. App. at 21a, (Wilson, J., dissenting).

Petitioners here do not dispute that Oklahoma's remedies are plain, speedy and efficient, but only suggest that the state remedies are not "adequate" because they do not provide for attorneys' fees. This, of course, is the sole reason why Petitioners appended a § 1983 "claim" to their action under 68 O.S. 1981, § 226. The first fallacy of Petitioners' reasoning, of course, is their assumption that

they have a federal "right" to attorneys' fees. As the Court has held, § 1983 confers no rights, it only gives a remedy. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979) ("One cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything.").

Further, the refusal of the court below to entertain an action under § 1983 so as to impose additional relief to Petitioners in the form of attorneys' fees, does not make the state remedy "inadequate." As the Court has said:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

Parratt v. Taylor, 451 U.S. 527, 544 (1981). *See also, Hudson v. Palmer*, 468 U.S. 517, 535 (1984) (That the petitioner might not be able to recover under state remedies the full amount which he might receive in a § 1983 action is not determinative of the adequacy of the state remedies.)

Finally, as the Court held in *Rosewell*, the failure of a state to pay interest on taxes refunded under state remedies does not mean that those remedies were not "plain, speedy and efficient" for purposes of the Tax Injunction Act, 28 U.S.C. § 1341. 450 U.S., at 523–524. The Court recognized that when it passed § 1341, Congress knew that many state tax systems commonly provided for payment of

taxes under protest with subsequent refund as their exclusive remedy. *Ibid.* And, the Court said:

> It is only common sense to presume that Congress was also aware that some of these same States did not pay interest on their refunds to taxpayers, following the then-familiar rule that interest in refund actions was recoverable only when expressly allowed by statute. It would be wholly unreasonable, therefore, to construe a statute passed to limit federal-court interference in state tax matters to mean that Congress nevertheless wanted taxpayers from States not paying interest on refunds to have unimpaired access to the federal courts. If Congress had meant to carve out such an expansive exception, one would expect to find some mention of it. The statute's broad prophylactic language is incompatible with such an interpretation.

Ibid. (Internal citation omitted). The same is true of attorney fees: the failure of some states to provide for attorney fees as part of the state remedies for challenging state tax systems is no more determinative—or destructive—of the adequacy and completeness of those remedies than the failure to pay interest.

In sum, Congress and this Court have recognized that, "in the unique area of state taxation," the principles of comity and federalism dictate a policy of federal noninterference in state tax matters, and Congress has expressed that policy by passing the Tax Injunction Act. The only condition for such noninterference is that the States provide complete and adequate remedies and procedures for challenging those state taxes and, as required by due process, provide "meaningful relief." Oklahoma has done

so, and the policies and dictates of Congress have been satisfied.

II

NEITHER THE SUPREMACY CLAUSE NOR THIS COURT'S DECISIONS REQUIRE THE STATE TO GRANT ADDITIONAL REMEDIES UNDER § 1988 IN STATE TAX CHALLENGES.

Petitioners argue that it is "clear" that their request for injunctive and declaratory relief against the challenged state taxes can be maintained under § 1983, relying on the footnote in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, n. 10 (1989). See Pet. Brf. at 20, n. 11. Thus, say Petitioners, by appending a request for such relief to their state-provided action to recover taxes paid under protest, they became entitled to engraft upon their state remedies a "right" to attorneys' fees under § 1988. However, the availability of injunctive and declaratory relief under § 1983 is far from "clear" in this case, and Petitioners' asserted "right" to attorneys' fees by virtue of federal law is directly contrary to Congress' expressed policy regarding state tax challenges.

First, the relied-upon footnote in *Will* says only that state officials in their official capacity, when sued for injunctive relief, are "persons" under § 1983 because official-capacity actions for prospective relief are not treated as actions against the state. *Ibid.*, citing *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985); and *Ex Parte Young*, 209 U.S. 123, 159–160 (1908). *Graham*, of course, relied upon *Young* for this proposition. *q.v.* And, contrary to Petitioners' assumption, whether injunctive or declaratory relief may be sought against state officials in their

official capacity in state tax matters is another question altogether.

As the Court has noted, after it was decided in *Ex Parte Young* that federal courts *may* enjoin state officers from enforcing an unconstitutional state law, Congress in 1937 enacted § 1341 and specifically prohibited such injunctive federal intrusions in state tax challenges where state law provided a plain, speedy and efficient remedy. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. at 102–103. For the same reasons, declaratory judgments against the validity of state taxes are also prohibited. *California v. Grace Brethren Church*, 457 U.S. at 411. As these cases hold, injunctive and declaratory relief would not be available in federal court under § 1983 or otherwise. Nor, as independent claims for relief, would they be available in state court in this case. *See, e.g., Oklahoma Tax Comm'n v. Harris, supra* (taxpayer may not maintain action to enjoin collection of a tax); and *Fair Assessment*, 454 U.S. at 115 (a declaration in this case as to the state statutes' validity is merely incident to Petitioners' claim for refund.) See n. 7, *supra*, at p. 6. Petitioners' claim against the State for refunds, of course, is not cognizable under § 1983 under any circumstance. See *Will*, 491 U.S. at 68–69.

Secondly, the simple answer to Petitioners' Supremacy Clause argument is that this case does not present a situation where federal remedies have been denied because they were thought to be contrary to the policy of the State. Just the opposite: the policy of the State is to provide taxpayers a plain, speedy and efficient method for challenging its tax laws, and to provide meaningful relief from those tax laws found to be unconstitutional—in this case, refunds. That, itself, is the very essence of the federal policy as reflected in § 1341 and the decisions of this Court.

Finally, Petitioners' claim of conflict with the purpose and policy of federal statutes is based upon their assumption that they have a "right" to attorneys' fees under § 1988. However, § 1988 simply does not create a fee liability where there is no liability under § 1983. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 168 (1985). It would be anomalous indeed to acknowledge Congress' intent "to limit drastically" federal-court interference with state tax systems, and at the same time urge that Congress intended to interfere with those systems directly by mandating the award of attorneys fees in state court actions regarding those systems, irrespective of state law.

CONCLUSION

The remedies here provided to Petitioners are plain, speedy and efficient. Consistent with Congress' announced policy, those state remedies are all the remedies to which Petitioners are entitled. The decision of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

OKLA. STAT. tit. 68, § 226 (1981):

(a) In addition to the right of appeal to the Supreme Court provided for in the preceding section, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling or finding of the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its official depository clearing account or special refund reserve account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together with interest on such amount at the rate of three percent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order. The refunds paid shall be payable as provided in Section 225(d).

(c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act

or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

(d) Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.

Supreme Court, U.S.
FILED
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No. 94-688

IN THE

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Oklahoma

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. CONTRARY TO RESPONDENTS' ASSERTION, THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, DOES NOT PERMIT STATE COURTS TO REFUSE TO APPLY 42 U.S.C. §§ 1983 AND 1988 IN STATE TAX SUITS	1
II. THERE IS NO SUPPORT FOR AMICI NCSL'S CLAIM THAT § 1983 WAS NOT INTENDED TO APPLY TO CHALLENGES TO STATE TAXES	3
III. PETITIONERS' CLAIM FOR RELIEF WAS RIPE FOR ADJUDICATION WHEN THEY WERE REQUIRED TO PAY THE CHALLENGED TAX IN ORDER TO OPERATE THEIR VEHICLES IN OKLAHOMA	13
Conclusion	15

TABLE OF AUTHORITIES

CASES	PAGE(S)
American Trucking Ass'ns, Inc. v. Conway, 152 Vt. 383, 566 A.2d 1335 (Vt. 1989)	11
American Trucking Ass'ns v. Goldstein, 312 Md. 583, 541 A.2d 955 (Md. 1988)	11
American Trucking Ass'ns, Inc. v. Gray, 483 U.S. 1306 (1987)	12
American Trucking Ass'ns v. Smith, 496 U.S. 167 (1990)	12
Baker v. Carr, 369 U.S. 186 (1962)	14
California v. Grace Brethren Church, 457 U.S. 393 (1982)	1,2
Consumer Product Safety Comm. v. GTE Sylvania, Inc. 447 U.S. 102 (1980)	4
Dennis v. Higgins, 498 U.S. 439 (1991)	5
Dennis v. State, Dist. Ct. Lancaster County, Docket 390, Page 26 (September 30, 1987), *aff'd*, 234 Neb. 427, 451 N.W.2d 676 (Neb. 1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991)	11
Denoie v. Board of Regents of the Univ. of Texas Sys., 609 S.W. 2d 601 (Tex. Civ. App. 1980)	10
Div. of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), *aff'd* 496 U.S. 18 (1990)	11
Dows v. Chicago, 78 U.S. (11 Wall) 108 (1871)	13
Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962)	12

CASES	PAGE(S)
Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981)	1,2,5
Felder v. Casey, 487 U.S. 131 (1988)	6
Georgia v. Private Truck Council, 258 Ga. 531, 371 S.E.2d 378 (Ga. 1988)	11
Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989)	4
Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)	12
Howlett v. Rose, 496 U.S. 356 (1990)	2
Hudson v. Palmer, 468 U.S. 517 (1984)	2
Hughes v. Rowe, 449 U.S. 5 (1980)	8
Huie v. Private Truck Council of America, 466 N.E.2d 435 (Ind. 1984)	11
Hutto v. Finney, 437 U.S. 678 (1978)	8
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	4
Kentucky v. Graham, 473 U.S. 159 (1985)	8
Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985)	3
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	5
Maher v. Gagne, 448 U.S. 122 (1980)	9
Maine v. Thiboutot, 448 U.S. 1 (1980)	5,9,14
Miller v. Standard Nut Margarine Co., 248 U.S. 498 (1932)	12
Monell v. Dept. of Social Services, 436 U.S. 658 (1978)	5

CASES	PAGE(S)
National Private Trucking Ass'n v. Indiana Dep't of State Rev., 512 N.E.2d 928 (Ind. Tax Ct. 1987)	11
Nordlinger v. Hahn, ___ U.S. ___, 112 S.Ct. 2326 (1992)	7
Oklahoma v. Harris, 126 P.2d 685 (Okla. 1942)	10
Parratt v. Taylor, 451 U.S. 527 (1981)	2
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984)	5
Private Truck Council of America v. State Department of Revenue, Circuit Court of Leon County, Case No. 85-368 (September 1, 1987), *aff'd*, 531 So. 2d 367 (Fla. Dist. Ct. App. 1988)	11
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)	8
Rosewell v. La Salle Nat'l Bank, 450 U.S. 503 (1981)	1,2
Save the Welwood Murrary Memorial Library Comm. v. City Council of Palm Springs, 215 Cal. App. 1003 (1989)	10
Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992).	7
Smith v. American Trucking Ass'ns, Inc., 300 Ark. 594, 781 S.W.2d 3 (Ark. 1989)	11
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	4
Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953)	4
United States v. Texas, 252 F.Supp. 234 (W.D. Tex. 1966)	13
United States v. James, 478 U.S. 597 (1986)	4

CASES **PAGE(S)**

Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 14

STATUTES

28 U.S.C. § 1341 1,2,3,13

42 U.S.C. § 1983 . . . . . passim

42 U.S.C. § 1988 . . . . . passim

68 O.S. 1981 § 226 10

TREATISES

Dan B. Dobbs, *Law of Remedies* (2d ed. 1993) . . 11

Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* (2d. ed. 1993) 6

Michael I. Saltzman, *IRS Practice & Procedure* (1981) 12

Norman J. Singer, *Sutherland Stat. Constr.* (4th ed. 1984) 4

No. 94-688

IN THE

Supreme Court Of The United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONERS' REPLY BRIEF

I. CONTRARY TO RESPONDENTS' ASSERTION, THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, DOES NOT PERMIT STATE COURTS TO REFUSE TO APPLY 42 U.S.C. §§ 1983 AND 1988 IN STATE TAX SUITS.

Respondents Oklahoma Tax Commission *et al.* rely entirely on the Tax Injunction Act, 28 U.S.C. § 1341, in support of the Oklahoma Supreme Court's decision in this case. They argue that the Act, as well as cases construing it, such as *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503 (1981) and *California v. Grace Brethren Church*, 457 U.S. 393 (1982), permit state courts to refuse to apply and enforce federal remedies under 42 U.S.C. §§ 1983 and 1988 in suits challenging state

taxes on federal constitutional grounds when "a plain, speedy and efficient remedy" for the constitutional violation may be had in the courts of the state. Resp. Br. at 8-18.[1]

Respondents, however, conspicuously fail to note that § 1341 by its terms only applies to, and limits the authority of, *federal* courts to entertain suits challenging state taxes when there is plain, speedy and efficient remedy in the state courts. Similarly, *Fair Assessment*, *Rosewell* and *Grace Brethren Church* all concerned actions brought in *federal* courts, and the only issue in those cases concerned the authority of the federal courts to entertain the actions.

Respondents have pointed to nothing in the language or legislative history of the Tax Injunction Act or in the cases construing it that remotely suggests that it was intended to have any effect on the authority or obligations of state courts to enforce federal rights and remedies, including those under §§ 1983 and 1988. Nor have respondents discussed *Howlett v. Rose*, 496 U.S. 356 (1990) or any of the other cases cited by petitioners establishing the fundamental obligation of state courts under our constitutional system to apply and enforce federal laws.[2]

Respondents also assert (Resp. Br. at 17) that this is not a case "where federal remedies have been denied because they

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[1] Two of the amici briefs supporting respondents, States of New Jersey *et al.* and Boyertown Area School District *et al.*, also rely heavily on 42 U.S.C. § 1341. Amici National Conference of State Legislatures, *et al.* (hereinafter "NCSL") does not.

[2] *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984), cited in Respondents' Brief at 14, have no bearing on the issue in this case. In those cases, the Courts held that the prisoner-petitioners' underlying constitutional claims — that state procedures that deprived them of property without due process are in violation of the 14th Amendment — were without merit, and therefore that there was no basis for a § 1983 claim. Nothing in *Parratt* or *Hudson* suggests that state courts need not apply and enforce §§ 1983 and 1988 when the plaintiffs' underlying constitutional claims are found to be meritorious, as they were in this case.

were thought to be contrary to the policy of the State." This assertion, however, is plainly incorrect. The Oklahoma Supreme Court denied the federal remedy of attorney's fees provided by 42 U.S.C. § 1988 because that remedy is not available under Oklahoma law, and its denial of that remedy constitutes a determination that such a remedy is contrary to state policy. That court did not hold that it could not provide such a remedy as a matter of federal law; it merely held that it was not required to do so by federal law and decided that it would not do so as a matter of state policy. Pet. App. 9a-10a.

II. THERE IS NO SUPPORT FOR AMICI NCSL'S CLAIM THAT § 1983 WAS NOT INTENDED TO APPLY TO CHALLENGES TO STATE TAXES

Unlike respondents and the Oklahoma Supreme Court, amici NCSL does not rely on the Tax Injunction Act, but argues instead that Congress never intended § 1983 to provide a remedial scheme for state taxpayers. NCSL Br. at 6-22. The Congress that enacted § 1983, NCSL maintains, "never considered the impact of subjecting [state tax systems] to Section 1983 suits." *Id.* at 11. In further support of its arguments, NCSL asserts that requiring state courts to apply and enforce § 1983 in state tax cases would "significantly disrupt state tax administration." *Id.* at 8.

These arguments are without merit on several counts.

1. It is an elementary principle that the starting point for determining the meaning and application of a statute is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). Here NCSL appears to acknowledge that the "literal" language of § 1983 applies to cases challenging state taxes (NCSL Br. at 17, 18), and it points to nothing in the legislative history of the statute indicating that Congress intended it *not* to apply to such cases. Yet it contends that the Court should construe § 1983 as not applying to such cases simply because, NCSL asserts, Congress never affirmatively

considered such an application. It asserts: "[T]he Forty-Second Congress never considered the question and thus did not intend for Section 1983 to provide a remedial scheme to challenge state taxation . . . ." *Id.* at 19.[3]

Petitioners are aware of no decision of this Court standing for the extraordinary proposition that a statute should be construed not to apply to a particular matter because Congress assertedly did not consider that specific application. As this Court has noted, it is commonplace for statutes to have particular applications that were not specifically considered. *See, e.g., Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 64 (1953). *See generally*, Norman J. Singer, *Sutherland Stat. Constr.* § 49.02 (4th ed. 1984) (collecting cases). If Congress wishes to limit the application of broadly worded statutes, the Court has properly required Congress to signify that intent in the language, or at least by very clear legislative history to that effect. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n.12 (1987); *United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Product Safety Com. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

On the other hand, NCSL's approach to statutory construction, if adopted, would cause great mischief. However clear any statute might appear on its face, its actual application to particular matters would be uncertain and would depend on the existence of evidence that Congress specifically contemplated that application.

Furthermore, NCSL's effort to carve one species of action out of § 1983's coverage is sharply at odds with this Court's consistent interpretation of that statute, both in general and specifically in connection with state tax matters. As the Court noted in *Golden State Transit Corp. v. City of Los Angeles*, 493

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[3] *See also id.* at 11, 12.

U.S. 103, 105 (1989), it has "repeatedly held that the coverage of [§ 1983] must be broadly construed." Similarly, in *Monell v. Dept. of Social Services*, 436 U.S. 658, 700-701 (1978), the Court stated that "there can be no doubt that [§ 1983] was intended to provided a remedy, *to be broadly construed*, against *all* forms of official violation of federally protected rights." (emphasis supplied.) In accordance with that principle, the Court has consistently rejected efforts to limit the scope of matters to which § 1983 applies. *See, e.g , Maine v. Thiboutot*, 448 U.S. 1 (1980); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

Moreover, contrary to NCSL's view, this Court has specifically held or stated on several occasions that § 1983 *does*, in fact, apply to state tax matters. In *McNary*, the Court specifically noted that the Missouri Supreme Court recognized § 1983 claims in its courts. 454 U.S. at 116. Subsequently, in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court observed that "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . must be brought in state court." *Id.* at 122. Finally, in *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court squarely held that a claim based on an unconstitutional state tax may be brought under § 1983.

2. NCSL is also wrong in contending that applying § 1983 to actions challenging state taxes would have significant adverse consequences beyond the recovery of attorney's fees. Specifically, NCSL claims that applying § 1983 in such cases would significantly disrupt state tax administration by overriding state procedures and by permitting injunctive and declaratory relief in cases in which such relief would not be available at state law. NCSL Br. at 8-18.

This claim is not correct. First, it should be noted that the Oklahoma Supreme Court did not indicate that any of the consequences hypothesized by NCSL were of concern to it or were a basis of its opinion. Moreover, none of them are at issue

in this case. Petitioners complied fully with state procedures in this case. As the court below noted in its first opinion, petitioners paid the challenged taxes before filing suit, gave notice of their intent to file suit challenging the taxes and served their complaint on the Chairman of the Tax Commission and the Oklahoma Attorney General, all as required by state law. Pet. App. 40a.

Furthermore, contrary to NCSL, plaintiffs who file a § 1983 claim in state courts are subject to state procedural requirements; the only exception is when such requirements discriminate against federal claims or impair the substantive remedies required by federal law. In general, state courts may use their own procedural rules in adjudicating federally created claims, (Friedenthal, Kane, & Miller, *Civil Procedure*, § 4.8 (2d ed. 1993)), and this same principle applies in the context of state enforcement of § 1983. *See Felder v. Casey*, 487 U.S. 131 (1988) ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.") Where, however, the state procedural requirement "so interferes with and frustrates the substantive right Congress created, under the Supremacy Clause, it must yield to the federal interest." *Id.* at 151.

Although NCSL asserts that applying § 1983 in state tax cases would prevent states from applying exhaustion-of-remedies requirements, notice-of-claim requirements and tax-specific statutes of limitations, that is not necessarily the case. Nor is it an issue in this case. While NCSL has cited decisions of this Court precluding state courts from applying those requirements and special statutes of limitation in other types of § 1983 actions (NCSL Br. at 9-10), those decisions would not foreclose the Court from deciding that such requirements may be imposed in tax cases if it were persuaded that they did not impair the vindication of the federal remedies mandated by § 1983 and were warranted by the state's special interests in tax matters.

Even if those requirements could not be imposed in tax cases, however, there is no basis for concluding that such a result would "significantly disrupt state tax administration," as NCSL claims. As we noted in our opening brief, many state courts have enforced § 1983 claims in cases challenging state taxes on federal grounds (Pet. Br. at 21, n. 12 (collecting cases)), and none of them has indicated that doing so has significantly disrupted their tax administration.[4]

The specter of punitive damages against state tax officials, which NCSL also raises (NCSL Br. at 9), is plainly a bogeyman. Damages of any kind under § 1983 against state officials, including tax officials, are only available where the official has been acting in bad faith. *See, e.g., Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992). Petitioners in this case did not assert any claim for damages against the individual respondents. In any event, a legitimate state tax system does not depend for its proper administration on the ability of its officials to act in bad faith disregard of the federal rights of taxpayers.

Nor is there any merit in the similar argument of amici States of New Jersey *et al.* that allowing persons to challenge state tax laws under § 1983 will encourage groundless suits against state officials. (New Jersey Br. at 14.) Groundless

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[4] In cases challenging the constitutionality of state tax statutes on their face, such as this one, exhaustion-of-administrative-remedies and notice-of-claim requirements do not usually serve important state interests in any event. Most state courts, for example, apply the generally accepted exception to the exhaustion-of-administrative-remedies requirement for claims challenging the constitutionality of a statute, inasmuch as administrators are not empowered to rule on such claims. *See, e.g., Nordlinger v. Hahn*, ___ U.S. ___, 112 S.Ct. 2326, 2330 (1992). State court rules requiring service of the complaint on the relevant state officials perform largely the same function as notice-of-claim requirements. While bringing a tax claim under § 1983 might result in a longer statute of limitations than state law would otherwise provide in some cases (and a shorter one in others), that result is hardly likely to "disrupt state tax administration" to any significant extent.

§ 1983 tax suits, like other § 1983 suits, will continue to be deterred not only by the prospect of unreimbursed attorney's fees and litigation expenses but also by the fact that, under § 1988, plaintiffs who file a § 1983 suit having no reasonable basis are liable for the attorney's fees and expenses of the defendants. *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980). Conversely, however, as New Jersey *et al.* effectively acknowledge (Br. at 21-22), potential liability under § 1988 for the attorney's fees of successful plaintiffs will serve as an effective deterrent to overreaching state tax officials. State tax officials are not ignorant of the fact that, without the ability to recover expenses, an out-of-state taxpayer confronted with a constitutionally dubious tax assessment will often opt to pay it rather than incur the far greater expense of a legal change in a distant state.[5] That kind of deterrence, petitioners submit, is entirely appropriate and, indeed, is a major purpose of § 1988.[6]

3. NCSL relies most heavily on a plaintiff's right under § 1983 to injunctive or declaratory relief to support its argument that § 1983 was not intended to provide remedies to persons in state tax cases and would disrupt state tax administration contrary to alleged congressional policy. NCSL Br. at 12-18. Again, however, although the right to equitable relief under § 1983 is an important aspect of the remedies available to

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[5] The brief of amicus Direct Marketing Association ("DMA") describes such instances of overreaching frequently faced by its smaller member companies whose marketing activities in distant states are not taxable under this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), but who are nevertheless often confronted with tax claims that are far cheaper to pay than to contest. DMA Amicus Brief, at 9-11.

[6] As petitioners noted in their opening brief, unless defendant officials are found personally liable for having acted in bad faith, this Court has recognized that the obligation to pay the fees of prevailing plaintiffs under § 1988 is one that falls on the state or agency represented by the official. *Hutto v. Finney*, 437 U.S. 678 (1978); *Kentucky v. Graham*, 473 U.S. 159, 164-67 (1985).

taxpayers under § 1983, there is no reason to believe that enforcement of that right will have any significant or inappropriate adverse impact on legitimate state tax systems or the administration of them.

In the vast majority of cases, when a state court of competent jurisdiction has rendered a final judgment that a challenged state tax is unconstitutional, the entry of a permanent injunction restraining the future collection of the tax, or a declaratory judgment, or both, is a largely unnecessary formality. Whether or not an injunction or formal declaratory judgment is issued, the state officials will almost always cease collecting the tax.[7] In this case, for example, after the Oklahoma Supreme Court issued its decision finding the challenged taxes unconstitutional, respondents ceased collecting them even though the court did not specifically direct or remand for the issuance of injunctive or declaratory relief. *See* Pet. App. 47a.[8] Issuance of equitable

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[7] If the judgment is entered by a trial court and the state tax authorities appeal, they may be entitled under state law to a stay of the judgment, including the injunction, pending appeal, upon whatever showings or conditions that state procedures may require. Although it is not an issue in this case, petitioners would not dispute that state procedures generally permitting stays of judgments pending appeal may be applied to equitable relief issued under § 1983 so long as those procedures are applied evenhandedly to judgments based on federal and state law.

[8] The court's decision did not foreclose the issuance of injunctive relief, but remanded the case to the district court "for a final determination of interest as provided by statute, calculated from the dates set forth in this paragraph, entry of judgment as to that amount, including notification to all class members as determined by the tax rolls of the Commission, and further proceedings not inconsistent with the views expressed herein." Pet App. 47a.

The fact that equitable relief under § 1983 was not specifically issued is immaterial to petitioners' entitlement to fees under § 1988. This Court has held that prevailing plaintiffs are entitled to attorney's fees under § 1988 if § 1983 would have been an appropriate basis for relief. *Maher v. Gagne*, 448 U.S. 122, 132 n. 15 (1980); *Maine v. Thiboutot*, 448 U.S. at 10-11 (1980).

relief, therefore, would not have significantly affected respondents actions in this case. Nor would it have been contrary to Oklahoma law, since Oklahoma statutes permit both injunctive and declaratory relief against Oklahoma taxes found to be invalid.[9]

To say that injunctive and declaratory relief are not necessary as a practical matter in the vast majority of cases is not to say that they are impermissible or inappropriate forms of relief in such cases, however. When, after due deliberation, a state court renders a final judgment finding a state tax to be unconstitutional or invalid under a federal statute, both injunctive relief and declaratory judgment are perfectly appropriate forms of relief under settled principles of equity to avoid the possibility of taxpayers having to file numerous repetitive suits to vindicate fully their federal rights. A judgment that merely awards refunds for taxes previously paid would not fully vindicate those rights if the tax authorities remained legally free to continue collecting the taxes at issue and the taxpayer were required to pay them and then file repetitive suits to recover them.

NCSL acknowledges that equity has long recognized the principle that injunctive relief is appropriate to avoid a multiplicity of suits. NCSL Br. at 13, n. 9. It is wrong, however, in contending, without citation of any supporting authority, that the "the advent of modern procedural rules has rendered this [principle] obsolete." *Id.* at 14, n. 9. Many cases recognize the continuing force and validity of this principle. *See, e.g., Denoie v. Board of Regents of the Univ. of Texas Sys.*, 609 S.W. 2d 601, 603 (Tex.Civ.App. 1980); *Save the Welwood Murrary Memo-*

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[9] Although respondents cite *Oklahoma v. Harris*, 126 P.2d 685 (Okla. 1942), as holding that injunctive relief is not available in tax cases, that decision involved a statutory remedy that apparently predated the statutory remedy herein, 68 O.S. 1981 § 226, which the Oklahoma Supreme Court in this case has described as "authorizing an action for declaratory and injunctive relief, including abatement of the challenged taxes, and a refund." Pet. App. 39a.

rial Library Comm. v. City Council of Palm Springs, 215 Cal. App. 1003, 1017 (1989); *see generally* Dan B. Dobbs, *Law of Remedies*, § 2.5(2) (2d ed. 1993). This principle applies fully in tax cases, and injunctive and declaratory relief is commonly granted in such cases.[10]

The fact that injunctive or declaratory relief might prove to be unnecessary in cases in which the tax authorities would honor the court's ruling on the merits in any event does not mean that an injunction or declaratory judgment is an inappropriate remedy in such cases; that fact simply means that in those cases such remedies will have no adverse effect at all on the tax authorities as a practical matter.[11]

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[10] *See, e.g., Dennis v. State*, Dist. Ct. Lancaster County, Docket 390, Page 26 (September 30, 1987), *aff'd*, 234 Neb. 427, 451, N.W.2d 676 (Neb. 1990), *rev'd on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439 (1991); *Huie v. Private Truck Council of America*, 466 N.E.2d 435, 436 (Ind. 1984); *Private Truck Council of America v. State Department of Revenue*, Circuit Court of Leon County, Case No. 85-368 (September 1, 1987), *aff'd*, 531 So. 2d 367 (Fla. Dist. Ct. App. 1988); *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So.2d 1000, 1002 (Fla. 1988), *aff'd* 496 U.S. 18 (1990); *Georgia v. Private Truck Council*, 258 Ga. 531, 371 S.E.2d 378, 379 (Ga. 1988); *Smith v. American Trucking Ass'ns, Inc.*, 781 S.W.2d 3, 6 (Ark. 1989); *National Private Trucking Ass'n v. Indiana Dep't of State Rev.*, 512 N.E.2d 928, 934 (Ind. Tax Ct. 1987); *American Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1335, 1342 (Vt. 1989); *American Trucking Ass'ns v. Goldstein*, 541 A.2d 955, 963 (Md. 1988). *See generally*, Dobbs, § 2.9(1) ("Injunctions that forbid future misconduct are also frequently coupled with an award of damages for harms already done.")

[11] Very different effects and considerations will apply to requests for *preliminary* injunctions against the collection of taxes from those that apply to permanent injunctions issued with a court's final judgment. Preliminary injunctions can have effects on state tax administration that are both substantial and unwarranted if they are issued on insufficient grounds. For those reasons, courts universally require a strong showing of likelihood of success on the merits and irreparable injury before they will issue a preliminary injunction. Petitioners do not dispute that those stringent requirements may be applied to requests for preliminary injunctions in tax suits brought under

Where those remedies *will* have a significant effect is precisely in those cases where they are essential to protect the taxpayers' federal rights, and therefore where such relief is most appropriate. Those include cases where, despite the court's ruling that a tax or tax practice violates federal rights, the tax authorities would continue to enforce the tax or practice. They also include cases where the imposition of the tax itself impairs a protected activity and where the award of refunds following litigation is insufficient to prevent that impairment.

Poll taxes are a good illustration of the latter situation. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), this Court held that requiring persons to pay a tax as a condition of voting invidiously discriminates against persons on account of their economic status in violation of the Equal Protection Clause. If a state enacts a poll tax, merely allowing a voter to sue for refunds after paying the tax is obviously an

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§ 1983. In this case, for example, the trial court denied petitioner's request for a preliminary injunction *despite* its view that petitioners would probably prevail on the merits (Pet. App. 58a), and petitioners have not disputed that ruling.

In some tax cases, however, even preliminary injunctive relief may be warranted, as this Court has recognized. In *American Trucking Ass'ns. v. Smith*, 496 U.S. 167, 174 (1990), the Court noted that Justice Blackmun had issued a common form of preliminary injunctive relief against an Arkansas truck tax. On the basis of his findings that there was a "significant possibility" that the Arkansas Supreme Court would find the tax unconstitutional and that there was a "substantial risk" that taxpayers would not be able to obtain refunds, Justice Blackmun ordered Arkansas to "escrow the HUE taxes to be collected, until a final decision on the merits in the case is reached." *American Trucking Ass'ns., Inc. v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers). *See also e.g., Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932) (preliminary injunction appropriate in extraordinary circumstances where challenged tax would put taxpayer out of business); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1,7 (1962) (preliminary injunction appropriate where tax authorities have no chance of success on merits); *see generally*, Michael I. Saltzman, *IRS Practice and Procedure*, § 15.10 (1981).

insufficient remedy for the violation of his constitutional rights. In such a case, injunctive relief is not only appropriate but essential. *See, e.g., United States v. Texas*, 252 F.Supp. 234, 255 (W.D.Tex. 1966) (enjoining enforcement of Texas poll tax). Under NCSL's argument, however, injunctive relief under federal law in such cases would not be available if state procedures provided the taxpayer with a plain, speedy and efficient refund remedy.

Contrary to NCSL, the cases it cites do not support the proposition that Congress did not intend § 1983 to provide state taxpayers with a right to equitable relief against unconstitutional state taxes in actions brought in state court. Like the Tax Injunction Act, *Dows v. Chicago*, 78 U.S. (11 Wall) 108 (1871) and the other cases cited at page 13 of NCSL's brief concerned only the propriety of *federal courts* enjoining state taxes, and those decisions were based entirely on principles of federalism and comity, not upon any view regarding the scope of remedies available under § 1983 in state tax cases.

In sum, there is no basis for NCSL's claim that § 1983 should be construed not to provide equitable remedies to taxpayers challenging state taxes in state courts.

III. PETITIONERS' CLAIM FOR RELIEF WAS RIPE FOR ADJUDICATION WHEN THEY WERE REQUIRED TO PAY THE CHALLENGED TAX IN ORDER TO OPERATE THEIR VEHICLES IN OKLAHOMA.

Alternatively, NCSL makes the remarkable argument that petitioners' claim for relief against Oklahoma's discriminatory truck taxes was not ripe for adjudication "for Section 1983 purposes" unless and until Oklahoma's highest court rejected their constitutional challenge to the tax. NCSL Br. at 22-30. NCSL bases this argument on the claim that taxation is an important state function and that constitutional challenges to state tax schemes often involve complex and difficult issues.

There is no merit to this argument. The argument could be applied with equal force to a wide variety of state actions that have been successfully challenged in § 1983 suits. Voting systems, for example, are also extremely important to states and challenges to them based on the Constitution or federal statutes likewise often involve difficult and complex issues. Nevertheless, in *Baker v. Carr*, 369 U.S. 186 (1962), this Court held that § 1983 provided a valid means to challenge an unconstitutional voting apportionment system. The same could be said of Maine's administration of its welfare system which recipients challenged in a § 1983 action as violating the federal Social Security Act in *Maine v. Thiboutot*. Indeed, virtually any state statute, practice or policy challenged as violating federal constitutional or statutory rights could be said to involve important state functions and to present potentially difficult issues.

There is no basis for distinguishing Commerce Clause challenges to discriminatory state truck taxes from the many other challenges to unconstitutional state actions that have been brought under § 1983. Petitioners' claim for relief under the Constitution and under § 1983 was ripe for adjudication when they were required to pay those taxes as a condition of operating their vehicles in the State of Oklahoma.

Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), on which NCSL primarily relies, provides no support for its argument. *Williamson* involved a claim of a taking of property in violation of the Just Compensation Clause. Taking claims of the kind considered in *Williamson* are very different from the constitutional claim in this case and in most other cases. In *Williamson*, whether or not the plaintiff had any valid constitutional claim depended on how much compensation the states agencies and courts might provide the plaintiff pursuant to the state's procedures. In this case, in contrast, Oklahoma's taxes infringed petitioners' constitutional rights the moment they were imposed,

and petitioners had a valid claim for relief at that moment. The claim in *Williamson* thus bears no resemblance to the claim in this case.[12]

In sum, there is no principled basis for holding that state court's need not enforce § 1983 in cases challenging state taxes on federal grounds.

CONCLUSION

The decision of the Oklahoma Supreme Court should be reversed and the case remanded so that the district court may entertain petitioners' application for attorney's fees and costs under 42 U.S.C. § 1988.

Respectfully submitted,

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[12] The fact that this Court has held that states have a variety of options for rectifying their unconstitutional taxes does not, contrary to NCSL's further argument (NCSL Br. at 26-27), mean that a taxpayer's constitutional claim for relief against the tax is not ripe for adjudication until the state has chosen the means for rectifying it. The options available to the state may affect the form of relief, equitable and otherwise, that the court decides to provide in its final judgment. They do not mean, however, that the taxpayer may not seek any relief until the state has decided what type of relief to provide.

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No. 94-688

IN THE
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OCTOBER TERM, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
WESTINGHOUSE ELECTRIC CORPORATION,
and ROY E. GRIFFIS,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

**On Writ of Certiorari to
the Supreme Court of Oklahoma**

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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ZOPP

QUESTION PRESENTED

Whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. STATE COURTS MAY NOT REFUSE TO HEAR § 1983 CHALLENGES TO STATE TAXES, AT LEAST WHERE THE COURTS HAVE JURISDICTION OVER OTHER § 1983 ACTIONS	5
II. PRINCIPLES OF "COMITY" AND "FEDERALISM" DO NOT JUSTIFY OKLAHOMA'S REFUSAL TO RECOGNIZE PETITIONERS' § 1983 CLAIMS	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases:

Claflin v. Houseman,
93 U.S. 130 (1876) 7

Dennis v. Higgins,
498 U.S. 439 (1991) 3, 5

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 10-11

Felder v. Casey,
487 U.S. 131 (1988) 11-12

Howlett v. Rose,
496 U.S. 356 (1990) . . . . . *passim*

Linderkamp v. Bismark School District No. 1, 397 N.W.2d 76 (N.D. 1986) 12

McKnett v. St. Louis & San Francisco R. Co., 292 U.S. 230 (1934) 8

Martinez v. California,
444 U.S. 277 (1980) 8

Mondou v. New York, N.H. & H. R.R.,
223 U.S. 1 (1912) 7, 8

Monroe v. Pape,
365 U.S. 167 (1961) 9

Parratt v. Taylor,
451 U.S. 527 (1981) 13

Rosewell v. LaSalle National Bank,
450 U.S. 503 (1981) 12

Page

Tully v. Griffin,
429 U.S. 68 (1976) 12

Wilhelm v. Gray, 766 P.2d
1357 (Okla. 1988), *cert. denied*,
490 U.S. 1092 (1989) 12

Younger v. Harris,
401 U.S. 37 (1971) 9-10

Statutes:

Tax Injunction Act, 28 U.S.C. § 1341 10-13

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 1988 . . . . . *passim*

OKLA STAT. tit. 68, § 226 . . . . . 3, 7, 11, 13

Miscellaneous:

Black's Law Dictionary (4th ed. 1968) 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-688

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, and ROY E. GRIFFIS,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this Court as well as other state and federal courts in cases where state taxing authorities are discriminating against interstate and/or foreign commerce or otherwise interfering with the ability of busi-

nesses to compete on an equal footing. *See, e.g., Barclays Bank PLC v. Franchise Tax Board*, 114 S. Ct. 2268 (1994); *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (1994); *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 112 S. Ct. 2365 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions.

WLF and AEF strongly believe that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. They believe that discriminatory taxing schemes such as the one struck down by the Oklahoma Supreme Court in this case can have extremely negative economic consequences, and that taxpayers who are subjected to such discrimination should be provided the tools necessary to obtain redress -- including access to all causes of action created under federal law.

Amici submit this brief in support of Petitioners with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioners' brief.

To summarize, Petitioners are a corporation and an individual which operated commercial trucks in Oklahoma in 1984, as well as a national trade association for trucking firms. In 1984, Petitioners filed suit in Oklahoma state court against the Oklahoma Tax Commission and certain of its officials, challenging the constitutionality of an Oklahoma tax imposed on Petitioners but not on Oklahoma

trucking companies. Petitioners had paid the tax under protest before filing suit. Petitioners asserted a right of action both under an Oklahoma statute (OKLA STAT. tit. 68, § 226 (1981)) and under 42 U.S.C. § 1983. Petitioners sought an award of attorney fees under 42 U.S.C. § 1988.

In 1990, the Oklahoma Supreme Court granted Petitioners partial relief under § 226. The court found that the challenged statutes were "plainly discriminatory" because they favored in-state business over out-of-state business and thus violated the Commerce Clause of the U.S. Constitution. Petition Appendix ("Pet. App.") 34a-38a. The court granted Petitioners a partial refund of taxes paid under the challenged statutes. *Id.* at 38a-46a. The court held that Petitioners could not maintain a right of action under 42 U.S.C. § 1983, and thus that Petitioners were not entitled to an award of attorney fees under 42 U.S.C. § 1988.

Petitioners filed a petition for writ of certiorari to review, *inter alia*, the Oklahoma Supreme Court's denial of their claims under 42 U.S.C. §§ 1983 and 1988. While the petition was pending, this Court issued its decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), which held that suits for violation of the Commerce Clause may be brought under 42 U.S.C. § 1983. On July 31, 1991, the Court issued an order vacating the Oklahoma Supreme Court's 1990 decision in this case and remanding for reconsideration in light of *Dennis*.

In 1994, the Oklahoma Supreme Court issued an opinion reaffirming its prior decision that Petitioners were not entitled to relief under §§ 1983 and 1988. Pet. App. 1a-11a. The court based its decision on "principles of comity and federalism" (Pet. App. 6a) and cited the Tax Injunction Act, 42 U.S.C. § 1341, as reflecting a federal policy against use of federal remedial schemes to challenge state taxes. *Id.* at 8a-9a. The court said that *Dennis* was not to the contrary, because it did not address the issue raised in this case: "whether a state court should decline to impose federal remedies when state remedies are adequate and a federal court would, therefore, be prohibited

from enforcing such remedies under the Tax Injunction Act." *Id.* at 7a.

On October 17, 1994, Petitioners filed a second petition for writ of certiorari, seeking review of the Oklahoma Supreme Court's refusal to recognize a right to redress under §§ 1983 and 1988. The Court granted the writ on January 6, 1995.

SUMMARY OF ARGUMENT

The decision of the Oklahoma Supreme Court is in direct conflict with this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990). In *Howlett*, the Court held that state courts of general jurisdiction may not pick and choose among those § 1983 causes of action that they are willing to recognize. Provided (as here) state courts have jurisdiction to hear some § 1983 causes of action, they may not refuse to hear others except on the basis of some neutral state rule regarding the administration of the courts. Not only has Oklahoma not suggested any such neutral rule in this case; it has been quite open in admitting that its decision is based on hostility to one particular aspect of the § 1983 cause of action -- the availability of attorney fees to prevailing plaintiffs. *Howlett* expressly forbade discrimination against a federal cause of action based on disagreement with the federal policies underlying that cause of action.

Oklahoma's resort to principles of "comity" and "federalism" is misplaced. "Comity" refers to voluntary restraints by the federal courts to avoid interfering with the ability of state governments to operate autonomously. Recognition of Petitioners' § 1983 cause of action would create no such interference. The most that could be said is that such recognition would result in a moderate depletion of state treasuries in order to pay attorney fee awards. But the same could be said of any of the numerous types of awards against state governments authorized pursuant to federal law, yet it has never been

suggested that principles of "comity" dictate that all such awards should cease.

ARGUMENT

I. STATE COURTS MAY NOT REFUSE TO HEAR § 1983 CHALLENGES TO STATE TAXES, AT LEAST WHERE THE COURTS HAVE JURISDICTION OVER OTHER § 1983 ACTIONS

The only difficult issue raised in this case -- whether the Commerce Clause confers "rights, privileges, or immunities" on Petitioners within the meaning of 42 U.S.C. § 1983 -- was conclusively settled in *Dennis*. The Court there decided that the Commerce Clause *does* confer such "rights, privileges, or immunities" and thus that suits for violation of the Commerce Clause could be brought under § 1983.[1] *Dennis*, 498 U.S. 439 (1991).

The Oklahoma Supreme Court now contends that, despite the clear holding of *Dennis*, the Oklahoma courts are entitled to decline to hear § 1983 challenges to state tax laws under the circumstances of this case. That contention amounts to an assertion of a state court's right to discriminate against federal causes of action -- an assertion that has been squarely rejected by this Court on numerous occasions.

There can be little doubt that the Oklahoma Supreme Court's unwillingness to recognize a § 1983 cause of

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[1] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

action was grounded in its hostility to the § 1988 attorney fee awards that such recognition would entail. The court stated repeatedly that the only significant difference between the § 1983 right of action under federal law and the § 226 right of action under state law was that taxpayers who prevailed under § 1983 could recover attorney fees while those who prevailed under § 226 could not. Pet. App. 6a-10a. The court stated that "the basis for its opinion" denying a § 1983 right of action was a "desire for intrastate consistency" (*id.* at 10a n.5), i.e., a desire to avoid recognition of a right of action that would provide prevailing taxpayers greater rights than those afforded under state law. The court also quoted approvingly from Justice Kennedy's dissenting opinion in *Dennis*, which expressed concern that the majority opinion, by providing taxpayers with access to § 1988 fee awards, might threaten "state fiscal integrity." *Id.* at 7a, quoting *Dennis*, 498 U.S. at 464-65 (Kennedy, J., dissenting).

Thus, this is not a case in which a state court applied some neutral state rule regarding the administration of the courts in declining to exercise jurisdiction over a federal cause of action. Rather, in declining to recognize a § 1983 right of action, the Oklahoma Supreme Court expressed a clear preference for state-law procedures over federal-law procedures and declined to give effect to the latter because they were broader than the former. This Court has repeatedly refused to permit such discrimination against federal causes of action, most recently in *Howlett v. Rose*, 496 U.S. 356 (1990). In *Howlett,* the Court refused to permit Florida courts to decline to hear § 1983 claims against a school board on the ground that the school board would be protected by sovereign immunity against similar claims brought under state law. *Howlett*, 496 U.S. at 380-81.

The Oklahoma Supreme Court's assertion that the remedies available under § 1983 (including § 1988 attorney fees) are in some way inconsistent with state-law remedies reflects a fundamental misconception of the nature of laws adopted by Congress. Although § 1983 was adopted by

Congress and not the Oklahoma state legislature, it is just as much a part of Oklahoma law as is § 226. As the Court recognized in *Howlett*:

> Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . The two together form one system of jurisprudence, which constitutes the law for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

Howlett, 496 U.S. at 367 (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876)).

Because § 1983 is part of the "Law of the Land" in Oklahoma, Oklahoma courts may not refuse to recognize a § 1983 right of action because of policy objections to some aspect of the right of action. "The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 371. *See also, Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 57 (1912)(congressional "policy is as much the policy of [a State] as if the act [of Congress] had emanated from its own legislature, and should be respected accordingly in the courts of the States").

This is not a case in which a state has declined to exercise jurisdiction over a federal claim based on some neutral state rule regarding the administration of the

courts.[2] Rather, Oklahoma's courts are courts of general jurisdiction which routinely hear § 1983 cases; and the Oklahoma Supreme Court readily admitted that it had *jurisdiction* to consider Petitioners' § 1983 claim but said that it nonetheless was declining to hear those claims for reasons of "comity" and "federalism." Pet. App. 9a-10a. Once jurisdiction over a federal court is established, a state court is not free to refuse to exercise that jurisdiction. "The existence of the jurisdiction creates an implication of duty to exercise it." *Mondou,* 223 U.S. at 58. Thus, the Court has held that the Supremacy Clause prohibits "a state court of general jurisdiction" from refusing to provide courts for enforcement of the Federal Employers' Liability Act "solely because the suit is brought under a federal law." *McKnett v. St. Louis & San Francisco R. Co.*, 292 U.S. 230, 233-34 (1934). In light of the Oklahoma courts' admitted jurisdiction over Petitioners' § 1983 claims, the Supremacy Clause requires Oklahoma to exercise that jurisdiction.

II. PRINCIPLES OF "COMITY" AND "FEDERALISM" DO NOT JUSTIFY OKLAHOMA'S REFUSAL TO RECOGNIZE PETITIONERS' § 1983 CLAIMS

In declining to recognize a § 1983 right of action, the Oklahoma Supreme Court did not directly address the *Howlett* line of cases. Rather, the court distinguished *Howlett* in a single sentence by noting that *Howlett* did not address "the issue of whether a state court should decline to impose federal remedies when state remedies are adequate and a federal court would, therefore, be prohibited from enforcing such remedies under the Tax Injunction Act." Pet. App. 7a.

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[2] This Court has understandably been quite reluctant to order state courts to accept jurisdiction over a class of federal claims which are of a type over which the state courts do not ordinarily exercise jurisdiction. Indeed, the Court has never decided whether states can be forced to create courts competent to hear *any* § 1983 claims. *See Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

Howlett did not, of course, discuss the Tax Injunction Act, since it did not arise in a tax collection context. But nothing in the Court's broadly worded opinion gave the slightest indication that state courts are free to decline to recognize § 1983 causes of action so long as state-law remedies are "adequate." Indeed, the Court has previously held that the existence of a state-law remedy does not negate the availability of federal relief under § 1983. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

More fundamentally, in citing principles of "comity" as a reason for declining to recognize a § 1983 cause of action, the Oklahoma Supreme Court has misconstrued this Court's use of that term in prior cases.

The term "comity" connotes one's willingness to defer to another as a matter of courtesy even when not required to do so. In the judicial context, comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference or respect." *Black's Law Dictionary* (4th ed. 1968). At first blush, it is difficult to discern what relevance "comity" has to this case, since the Oklahoma Supreme Court gave no hint that it was deferring to the laws of any other jurisdiction.

This Court most fully explained its understanding of "comity" in the federal/state context in *Younger v. Harris*, 401 U.S. 37 (1971), which held that federal courts should not enjoin pending state-court criminal prosecutions except under extraordinary circumstances. Although recognizing that federal courts have the *power* to issue such injunctive relief, the Court held that federal courts should not do so for reasons of "federalism" and "comity." *Younger*, 401 U.S. at 44-45. The Court explained "the notion of 'comity'" as:

> [A] proper respect for state functions, a recognition of the fact that the entire country is made

> up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

The Court applied *Younger* in the state tax collection context in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). *McNary* involved a § 1983 suit filed in federal court by taxpayers seeking damages against county real estate tax officials for alleged due process and equal protection violations in collection of real estate taxes.[3] The Court held that such suits "are barred by the principle of comity." *McNary*, 454 U.S. at 116. The Court reasoned that permitting such federal-court suits would be extremely disruptive of state tax collection efforts (*id.* at 112-115); the Court said that "the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts" and that notions of "comity" and "federalism" dictated the preservation of such autonomy and fiscal stability. *Id.* at 102-03, 104-05.

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[3] The Tax Injunction Act, 28 U.S.C. § 1341, did not act to bar the suit, because the suit sought money damages rather than injunctive relief. Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Neither *Younger* nor *McNary* provide any support for the Oklahoma Supreme Court's ruling. Those decisions made clear that "comity" refers to voluntary restraint by the federal courts to avoid interfering with the ability of state governments to operate autonomously. Petitioners do not seek the right to use the federal courts to interfere with state tax-collection activities; rather, in recognition of the autonomy of the Oklahoma state government, Petitioners sought relief in the Oklahoma courts. It is no affront to principles of "comity" or "federalism" to insist that Oklahoma courts recognize (as made clear by *Howlett*) that § 1983 is just as much a part of Oklahoma law as is § 226 or any other Oklahoma statute. Indeed, *McNary* noted that the Missouri courts were willing to recognize the taxpayers' § 1983 claims, without any indication that it viewed such recognition as an affront to principles of comity. *McNary*, 454 U.S. at 116.

The Tax Injunction Act, 28 U.S.C. § 1341, adds nothing to Oklahoma's argument. As is true of the principles of "comity" outlined in *McNary*, that statute is aimed at preventing federal court interference with state tax-collection activity. The purposes underlying § 1341 simply do not come into play when a taxpayer seeks to enforce a § 1983 right of action in state court.

The Oklahoma Supreme Court noted that Petitioners were forbidden by § 1341 from asserting their § 1983 cause of action in federal court. It then concluded that the § 1983 cause of action should not be recognized in state court either; otherwise, the court reasoned, the outcome of the § 1983 claim would depend on whether it had been brought in state or federal court, a supposed "perver[sion]" of this Court's "wise policy of intrastate uniformity between state and federal courts." Pet. App. 8a. The court cited *Felder v. Casey*, 487 U.S. 131 (1988), for the proposition that "one of the principles of comity is that potential differences in remedies available in state court and federal court should be avoided." *Id.*

The Oklahoma Supreme Court has completely misconstrued *Felder*. That case held that the Wisconsin state courts could *not* defeat a § 1983 cause of action by invoking a state law notice-of-claim requirement which would not have been recognized in federal court. Contrary to the Oklahoma Supreme Court's assertion, *Felder* never indicated that this preemption of a state law requirement (in order to achieve uniformity of result in state and federal courts) was an illustration of "comity"; indeed, it was quite the opposite, because *Felder* declined to defer to the state procedural requirement. Moreover, there is nothing inconsistent between the absence of jurisdiction over Petitioners' § 1983 claims in the federal courts and the recognition of those claims in Oklahoma state courts. In declining to exercise jurisdiction, the federal courts are not expressing any opinion on the merits of such claims; indeed, declining to exercise jurisdiction is the essence of comity and provides absolutely no support for Oklahoma's refusal to recognize a § 1983 claim.

The Oklahoma Supreme Court also cited with approval an assertion by the North Dakota Supreme Court that "the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes." Pet. App. 6a-7a (quoting *Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76 (N.D. 1986)). That is a misreading of § 1341; there is no indication in the language or history of § 1341 or this Court's case law construing § 1341 that Congress intended to create "deference to state remedial schemes." The sole concern of § 1341 is to prevent "federal court interference in state tax matters." *See Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522-524 (1981); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

Finally, the Oklahoma Tax Commission's citation to the Oklahoma Supreme Court's decision in *Wilhelm v. Gray*, 766 P.2d 1357 (Okla. 1988), *cert. denied*, 490 U.S. 1092 (1989), is inapposite. Respondents' Brief in Opposition to Petition at 12-13. *Gray* held that Oklahoma had not deprived the plaintiff of liberty and property

without due process of law because the plaintiff had been offered an adequate post-deprivation hearing. That decision was based on decisions of this Court (such as *Parratt v. Taylor*, 451 U.S. 527 (1981)) which make clear that provision of an adequate post-deprivation hearing often is all the process that is due an individual under the Due Process Clause. However, Petitioners have asserted claims under the Commerce Clause. There is no similar post-deprivation-hearing doctrine applicable to Commerce Clause claims; for example, a state does not eliminate a Commerce Clause violation simply by providing taxpayers who have been the victims of a discriminatory tax with a full opportunity to contest the tax under state law.

In sum, the availability of an "adequate" state-law remedy does not negate Petitioners' right to pursue a § 1983 cause of action.[4] Indeed, if the adequacy of alternative remedies were the key consideration, then *Howlett* presented a far stronger case for application of "comity" principles than does this case. In *Howlett*, the plaintiff had the option of asserting his § 1983 cause of action in federal court; he voluntarily chose a state-court forum. In contrast, § 1341 prevented Petitioners from asserting their claims in federal court. Yet, the Court did not hesitate in *Howlett* to require the Florida courts to recognize the § 1983 claims of the plaintiff in that case. Accordingly, Petitioners' right to proceed in state court with their § 1983 claims should be recognized without regard to the adequacy of their alternative state-law remedies.

---

[4] The "adequacy" of the § 226 remedy under Oklahoma law is certainly subject to question. Most obviously, it does not provide Petitioners with the same right to attorney fees available under § 1983. Moreover, a § 1983 plaintiff is entitled to pursue a damage claim (including a claim for consequential and punitive damages) against any "person" within the meaning of § 1983 -- a category that includes all state tax officials being sued in their individual capacities, as well as all local taxing authorities and officials. Also, defenses to a § 1983 action are a matter solely of federal law. It is not at all clear that remedies created under Oklahoma law provide nearly as many rights to taxpayers.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Education Foundation respectfully request that the Court reverse the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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19pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 4

I. SECTIONS 1983 AND 1988 GRANT RELIEF TO "PREVAILING" PARTIES FOR THE "DEPRIVATION OF ANY RIGHTS" PROTECTED BY THE CONSTITUTION 4

II. THE SUPREMACY CLAUSE REQUIRES STATE COURTS TO ENTERTAIN SECTION 1983 CLAIMS WHEN THEY ENTERTAIN SIMILAR CLASSES OF ACTIONS UNDER STATE LAW . . . 5

III. THE TAX INJUNCTION ACT DOES NOT BAR SECTION 1983 CHALLENGES TO UNCONSTITUTIONAL STATE TAXES IN STATE COURT . . . 7

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES

Bloomingdale's By Mail Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 113 S. Ct. 3002 (1993) 10
Bung's Bar & Grille v. Florence Township, 502 A.2d 1198 (N.J. Super. Ct. Law Div. 1985) 10
Claflin v. Houseman, 93 U.S. 130 (1876) 5
Dennis v. Higgins, 498 U.S. 439 (1991) 2, 3, 5
Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 9
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Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue, 583 N.E.2d 214 (Ind. Tax Ct. 1991) . . . 10
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PAGE

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Testa v. Katt, 330 U.S. 386 (1947) 6
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Wilson v. Garcia, 471 U.S. 261 (1985) 11
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 5

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U.S. Const. art. VI 2, 3, 5
Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1988) . . . . . *passim*
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H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937) 11
S. Rep. No. 1035, 75th Cong., 1st Sess. (1937) 9

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PAGE

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BRIEF OF THE NATIONAL RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST[1]

The National Retail Federation (the "Federation") is the world's largest retail trade association. Its members include department, specialty, discount, mass merchandise and independent stores, as well as 31 national and 50 state associations. Despite differences in product line, customer base and the size of their businesses, the members of the Federation share certain characteristics: They conduct business in interstate commerce, they are subject to innumerable state and local taxes, including property, income and excise taxes; and they are responsible for

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[1] Counsel for all parties have consented to the filing of this amicus brief. Amicus has filed those consents with the Clerk of this Court.

the collection of state sales and use taxes from their customers and the remission of those taxes to state authorities.

At the same time that members of the Federation have recognized the obligation to pay and collect taxes under applicable state law, they have resisted the imposition of such taxes when they conflict with the requirements of the United States Constitution. Some members of the Federation, for example, have challenged state laws requiring the collection of sales and use taxes when they lacked a sufficient nexus to the taxing state and when the tax at issue otherwise discriminated against interstate commerce.

Like the Petitioners in this case, the Federation believes that when a state tax violates the United States Constitution, state courts of general jurisdiction cannot refuse to entertain all applicable claims under federal law, including those Congress has established for prevailing parties under 42 U.S.C. §§ 1983 and 1988. That conclusion follows from the plain language of 42 U.S.C. §§ 1983 and 1988, the dictates of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, and this Court's decisions in *Dennis v. Higgins*, 498 U.S. 439 (1991), and *Howlett v. Rose*, 496 U.S. 356 (1990).

Contrary to these settled principles, however, the Oklahoma Supreme Court held that Petitioners were not entitled to bring their § 1983 and § 1988 claims in state court. *See Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n*, 879 P.2d 137 (Okla. 1994) (per curiam). In doing so, the court relied on, and misapprehended the meaning of, the Tax Injunction Act, 28 U.S.C. § 1341 (1988) (the "Act" or "Tax Injunction Act"), which only prevents taxpayers from challenging state taxes in federal court. *Id.* The Federation submits this amicus brief in support of the Petitioners and urges the Court to reverse the decision of the Oklahoma Supreme Court.

INTRODUCTION AND SUMMARY

In ruling that Petitioners may not file claims under 42 U.S.C. §§ 1983 and 1988 when challenging the constitutionality of a state

tax, the Oklahoma Supreme Court disregarded several overriding requirements of federal law. To begin with, § 1983 and § 1988 plainly grant relief to taxpayers who can establish the invalidity of a state tax on Commerce Clause grounds. By their plain terms, the two statutes grant remedies to the "prevailing" party for the "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. §§ 1983 and 1988. Neither statute, it is clear, makes any exception for state tax claims. *See Dennis v. Higgins*, 498 U.S. at 451 (the state court "erred in holding that [the taxpayer's] Commerce Clause claim could not be brought under 42 U.S.C. § 1983").

Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, moreover, state courts of general jurisdiction do not have a free hand in deciding whether to entertain actions arising under federal law. Once they open their doors to one class of actions under state law, they cannot refuse to hear similar actions arising under federal law. Such discrimination against federal rights violates the "constitutional duty" that the Supremacy Clause "imposes on state courts . . . 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)). This anti-discrimination principle applies with equal force to § 1983 actions, as the Court recently confirmed in *Howlett v. Rose*, 496 U.S. at 375 (the "Florida court's refusal to entertain . . . § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause"). Here, since the Oklahoma courts entertain declaratory and injunctive relief actions challenging the validity of state taxes — and did so in this case — they cannot refuse to entertain related federal challenges to those taxes.

Nor does the Tax Injunction Act of 1937 alter these requirements. The Act limits the jurisdiction of federal "district courts" to enjoin state taxes, not state courts. 28 U.S.C. § 1341. As a forum-shifting provision that directs where state tax challenges must be filed, the Act by no means cuts back on the scope of

§ 1983 actions or for that matter speaks to the scope of *state court jurisdiction* at all.

Adopting the Oklahoma Supreme Court's analysis also would virtually, if not altogether, prevent § 1983 from being used in state tax cases. That is implausible as a matter of textual analysis, since the plain language of § 1983 reveals that it applies to "any" deprivation of constitutional rights. This interpretation is also implausible as a matter of legislative intent. If one law typifies the evils that § 1983 was designed to address, it is a racially discriminatory poll tax. Yet under the analysis adopted by the Oklahoma Supreme Court, even that deprivation of civil rights could not be attacked — though it was just such deprivations of constitutional rights that § 1983 was designed to address in the first place. There is, in short, no tenable basis for concluding that the Tax Injunction Act either explicitly or implicitly repealed § 1983's application to unconstitutional state taxes.

ARGUMENT

I. SECTIONS 1983 AND 1988 GRANT RELIEF TO "PREVAILING" PARTIES FOR THE "DEPRIVATION OF ANY RIGHTS" PROTECTED BY THE CONSTITUTION.

The Oklahoma Supreme Court dismissed Petitioners' § 1983 and § 1988 claims, holding that the Tax Injunction Act and general principles of comity prevented such claims from being brought in state court. In showing why that conclusion is mistaken, it is important at the outset to clarify that Sections 1983 and 1988 make no exception for unconstitutional state taxes. By their plain terms, the statutes apply to violations of all constitutional rights. Section 1983 permits parties to obtain relief from the "deprivation of *any* rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (1988) (emphasis added). Section 1988 permits "the prevailing party" to obtain attorney's fees in "*any* action" under § 1983. 42 U.S.C. § 1988 (1988 & Supp. V 1993), *as amended by* Pub. L. No. 103-322 § 40303, 108 Stat. 1942 (1994) (emphasis added). The statutes make no distinction between state taxes and other state

laws, between personal rights and property rights, or between violations of the Commerce Clause and violations of other constitutional guarantees. The relief mandated by Congress under these statutes, in other words, extends to the deprivation of any and all rights secured by the Constitution, including those established by the Commerce Clause.

Confirming the point, this Court recently held that the Nebraska Supreme Court "erred in holding that [the taxpayer's] Commerce Clause claim could not be brought under 42 U.S.C. § 1983." *Dennis v. Higgins*, 498 U.S. 439, 451 (1991). As *Dennis* demonstrates, the Commerce Clause is no less "the source of a right of action" under § 1983 than other federal rights. *Id.* at 450.

II. THE SUPREMACY CLAUSE REQUIRES STATE COURTS TO ENTERTAIN SECTION 1983 CLAIMS WHEN THEY ENTERTAIN SIMILAR CLASSES OF ACTIONS UNDER STATE LAW.

Just as the plain language of §§ 1983 and 1988 extends to Commerce Clause challenges, the Supremacy Clause of the United States Constitution requires state courts of general jurisdiction to entertain claims under §§ 1983 and 1988. "This Constitution and the laws of the United States," the Supremacy Clause affirms, "shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art VI. In view of that requirement, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *see Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222 (1916); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 571 (1832) ("Where, by the Constitution, the power of legislation is exclusively vested in congress, they legislate for the people of the Union, and their acts are as binding as are the constitutional enactments of a state legislature on the people of the state.").

Time and time again, this Court has held that in light of the Supremacy Clause state courts do not have a free hand in

determining whether to entertain federal causes of action. Once a State decides to create courts of general jurisdiction that entertain certain classes of actions, it cannot subsequently exclude from those courts similar classes of actions arising under federal law. Such discrimination against federal rights violates the "constitutional duty" that the Supremacy Clause "imposes on state courts . . . 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)). *See also Testa v. Katt*, 330 U.S. 386, 394 (1947) (Rhode Island courts could not decline jurisdiction over claims under the federal Emergency Price Control Act when jurisdiction was otherwise "adequate and appropriate under established local law"); *Miles v. Illinois Central R.R.*, 315 U.S. 698, 703-04 (1942) ("By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source"); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 232-34 (1934) (since state court had "general jurisdiction of the class of actions to which that here brought belongs," the refusal to hear an action under Federal Employers' Liability Act ("FELA") discriminated against federal rights); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 59 (1912) (Connecticut state courts are obligated to enforce rights under the FELA "when their jurisdiction, as prescribed by local laws, is adequate to the occasion").

Most recently, in *Howlett v. Rose*, 496 U.S. 356 (1990), a unanimous Court laid to rest any confusion about the application of this anti-discrimination principle in the context of § 1983 claims. At issue in *Howlett* was a Florida rule of law that conferred immunity on state governmental entities from federal civil rights actions under § 1983, even though the entities were not immune in otherwise identical state-law tort actions. As an initial matter, the Court noted:

> A state court may not deny a federal right, when the parties and controversy are properly before it . . . The existence of the jurisdiction creates an implication of the duty to exercise it.

Id. at 369-70. (citations and internal quotation omitted). The "implication of the duty" to hear federal claims, the Court continued, becomes mandatory if the State's courts permit similar types of action to be heard "according to their regular modes of procedure." *Id.* at 367. The Court then concluded that "the Florida court's refusal to entertain . . . § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375. At the same time, the Court also made clear that this requirement relates not to whether state and federal *courts* must entertain similar actions, but to whether state courts must entertain similar state and federal *claims*. *See, e.g., id.* at 380 ("A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held for § 1983 violations in the courts of the State," an explanation that "flatly violates the Supremacy Clause").

Howlett plainly applies here. Like the Florida courts at issue in *Howlett*, the Oklahoma courts at issue here are courts of general jurisdiction that have authority to entertain challenges to the validity and application of a state tax. Accordingly, when Petitioners challenged the validity of an Oklahoma tax in these courts, they were entitled to bring all related federal causes of action, including claims under 42 U.S.C. §§ 1983 and 1988.

III. THE TAX INJUNCTION ACT DOES NOT BAR SECTION 1983 CHALLENGES TO UNCONSTITUTIONAL STATE TAXES IN STATE COURT.

The Oklahoma Supreme Court, it is true, did not purport to take issue with either *Dennis* or *Howlett*. The court acknowledged that *Dennis* "decided that the Commerce Clause creates rights that can be asserted under 42 U.S.C. § 1983 because the Commerce Clause confers rights, privileges or immunities within the meaning of § 1983." *Private Truck Council of America, Inc. v. Oklahoma Tax Comm'n*, 879 P.2d 137, 139-40 (Okla. 1994)

(per curiam). Likewise, the court recognized that *Howlett* "requires state courts to enforce federally created remedies 'according to their regular modes of procedure.'" *Id.* at 141 (quoting *Howlett*, 496 U.S. at 367).

Still, the court claimed that *Dennis* and *Howlett* were distinguishable because they failed to consider "principles of comity" and the requirements of the Tax Injunction Act. *Id.* Reasoning that the Act generally prevents litigants from challenging the validity of state taxes in federal court, the court concluded that "state courts are not required" to entertain §§ 1983 and 1988 challenges to state taxes "when federal courts would be prohibited from doing so." *Id.* However, neither the Tax Injunction Act nor general principles of comity can bear this heavy reliance. Nor, for that matter, can the requirements of *Dennis* and *Howlett* be overcome so easily.

First and foremost, the Oklahoma Supreme Court misconstrued the meaning of the Tax Injunction Act. The plain import of the Act is to limit the jurisdiction of federal courts, not state courts. The language of the Act, above all else, makes that clear. "The *district courts*," it says,

> shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had *in the courts of such State*.

Id. (emphasis added). The Act thus is merely a forum-shifting provision that directs where state tax challenges must be filed; but the Act by no means cuts back on the scope of § 1983 actions or indeed speaks to the scope of *state court jurisdiction* at all.

In view of the clear language of the Act, there is no need to look beyond its text, which directly contradicts the Oklahoma Supreme Court's conclusion that the Act somehow limits the authority of state courts to entertain § 1983 claims. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Even so, it is worth adding that the legislative history confirms what the text so clearly establishes. The Act's primary sponsor, Senator Bone (D-Wash), indicated that the Act only "would affect *the*

jurisdiction of district courts of the United States over suits relating to the collection of State taxes," and the "purpose of the bill is to *take away the jurisdiction of Federal district courts*." 81 Cong. Rec. 1415 (1937) (emphasis added). Other sections of the legislative history are to the same effect. They indicate that the Act was designed to preserve state access to tax revenues during litigation, and ultimately to limit the authority of life-tenured federal judges to impact State revenue collection. The Senate Judiciary Committee stated that the bill would enable "States and their various agencies to survive while long-drawn-out tax litigation is in process." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). It further noted that under existing law, federal courts had authority to enjoin state tax collection, thereby permitting taxpayers "to withhold . . . taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances." *Id.* at 2.

Not one of the explanations for adopting the Act indicates that Congress was reluctant to allow *state courts* to entertain all or even certain types of state tax challenges. On the contrary, they suggest that the Act was designed to funnel *all* such challenges to state courts. Consistent with this understanding (and in contrast to the decision below), this Court has frequently stated that litigants are *required* to file § 1983 actions in state court in order to comply with the forum-shifting requirements of the Tax Injunction Act. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 (1984) ("Challenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . *must be brought in state court*" (emphasis added)); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514-15 & n.19 (1981) ("The Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive claims from the federal district courts to the state courts."); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) (in denying *federal* court jurisdiction over a § 1983 challenge to state taxation, the Court observed that Missouri courts had "expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court").

Several state courts have reached similar conclusions. *See, e.g., Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue*, 583 N.E.2d 214, 221 (Ind. Tax Ct. 1991) ("application of the [Tax Injunction Act's] standard in state court would operate to bar § 1983 claims from both state and federal fora, a result not intended by the [Act]"); *Bung's Bar & Grille v. Florence Township*, 502 A.2d 1198, 1214-15 (N.J. Super. Ct. Law Div. 1985) (the Tax Injunction Act could not intend to prohibit access to all courts for § 1983 claims); *Marx v. Truck Renting & Leasing Ass'n*, 520 So.2d 1333, 1346 (Miss. 1987) ("[I]t is the absence of federal jurisdiction under [the Tax Injunction Act] which operates to open the door to the state courthouse so that the taxpayer may there assert his § 1983 claim"). *See generally, Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 1135 S. Ct. 3002 (1993); *Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), *cert. denied*, 114 S. Ct. 1397 (1994).[2]

As these cases suggest, one of the extraordinary consequences of the Oklahoma Supreme Court's decision is to deprive taxpayers of *any* forum in which to raise §§ 1983 and 1988 claims in state tax cases. For the Tax Injunction Act would generally prohibit the filing of such claims in federal court, while the decision below

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[2] Commentators have reached similar conclusions. *See, e.g.*, William L. Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 419 (1985) ("Given that federal courts cannot entertain state tax section 1983 claims and that the remedies under that section are needed to ensure the protection of taxpayers' rights, the assured availability of state courts as fora for these claims is of paramount importance."); Mark S. Poker, *Utilizing Constitutional Torts Against State Tax Officials: Leveling the Playing Field*, 10 (No. 3) Journ. State Tax'n 63, 69 (1991)("The application of the Tax Injunction Act to state court proceedings to deny taxpayers a forum defies logic"); *See generally* Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1988 (1990); Anne R. Yuengert, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 Wash. & Lee L. Rev. 381(1988).

would prohibit those same claims from being filed in state court. Such an interpretation thus would repeal § 1983's settled application to state tax challenges. That is an untenable interpretation of the Tax Injunction Act under established rules of statutory construction.

Plainly, the text of the Tax Injunction Act (enacted in 1937) contains no indication that it was intended to cut back on the scope of § 1983 (enacted in 1871). The text focuses on the appropriate forum for state tax claims, not on the law applicable to them. Nor does the legislative history advance this interpretation. The House and Senate Reports both provide that the Act was not intended to foreclose any federal rights and remedies:

> It should be emphasized that the bill does not take away any equitable right of the taxpayer or *deprive* him of his *day in court* . . . . A full hearing and judicial determination of the controversy is assured.

H.R. Rep. No. 1503, 75th Cong., 1st Sess., at 2 (1937) (emphasis added); *see also*, 81 Cong. Rec. at 1416 (comments by Sen. Bone).

Here, however, it is beyond dispute that the Oklahoma Supreme Court "deprive[d]" Petitioners of their "day in court" on their § 1983 claims. The court's analysis, moreover, would deny § 1983 relief with respect to all unconstitutional taxes, even those that the civil rights laws were clearly intended to cover. If one law typifies the evils that § 1983 was designed to address, it is a racially discriminatory poll tax. *See Wilson v. Garcia*, 471 U.S. 261, 273 n.31 (1985). Yet under the decision below, even that deprivation of civil rights could not be attacked — though it was just such deprivations of constitutional rights that § 1983 was designed to address in the first place. *Cf. Terry v. Kolski*, 254 N.W.2d 704, 709 n.2 (Wis. 1977) (such a decision would "ratify adherence to the very evil the civil rights acts were designed to obviate — the refusal of state courts and officers to vindicate civil rights afforded by the Constitution").

Nor does the Tax Injunction Act repeal § 1983 by implication — at least, that is, the part of § 1983 that applies to unconstitutional state taxes. Such repeals, this Court has indicated, are highly "'disfavored.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974)). Indeed, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). No such "intention to repeal" exists here. Nor are the two statutes "irreconcilable": State court jurisdiction of § 1983 tax challenges affirms the principles of § 1983 (enforcement of civil rights) and those of the Tax Injunction Act (noninterference of federal courts with state taxes).

The Oklahoma Supreme Court also erred in concluding that it would somehow be incongruous to require state courts to exercise jurisdiction over federal claims that cannot also be heard in federal court. The result is not unusual, but simply follows from the nature of our federalist system. In particular, it follows from having a judicial system containing federal courts of limited jurisdiction and state courts of general jurisdiction. A Connecticut state court recently reached this same conclusion:

> "[F]ederal courts . . . are courts of limited jurisdiction marked out by Congress." State . . . courts, in contrast, are courts of general jurisdiction . . . .
>
> In a judicial system characterized by this architecture, it is not at all anomalous for state courts to have jurisdiction over matters that federal courts cannot lawfully adjudicate. Domestic relations matters are an obvious example. State tax appeals are another . . . . Neither the letter nor spirit of § 1341 are violated by the existence of such state court jurisdiction. This jurisdiction, in fact, fully implements the policies of *both* § 1983 (i.e. the vindication of civil rights) and § 1341 (i.e. the noninterference of federal courts in state tax matters) in a way that federal jurisdiction does not.

Pechiney Corp. v. Crystal, 643 A.2d 319, 321 (Conn. Super. Ct. 1994) (citations omitted).

No less flawed is the argument that § 1983 and § 1988 should not apply in "business" cases or that states should not be compelled to pay attorney's fee awards in such cases. As shown, the two statutes make no distinctions between corporate litigants and individuals ones. All taxpayers, Congress has determined, deserve relief. Nor is the policy reflected in this language in any way unsound. After all, only "prevailing" parties — i.e., those who have established the unconstitutionality of a state tax — obtain the benefits of these statutes. That is an appropriate remedy when states impose unconstitutional taxes. As the diverse membership of the Federation reveals, not all retailers are large and not all retailers can afford to litigate unconstitutional taxes. What is more, many of the Commerce Clause questions that retailers litigate concern taxes imposed on *consumers*, not retailers, though it is retailers that ultimately bear responsibility for collecting the taxes under state law. In any event, the wisdom of permitting *all* taxpayers to file § 1983 and § 1988 claims is a matter of policy, which can be modified properly only by congressional — not judicial — action.

Finally, the Oklahoma Supreme Court claimed that "principles of comity" independently supported its decision. 879 P.2d at 141-42. That, too, is wrong. "Principles of comity" no doubt underlie the Tax Injunction Act's determination that federal courts should defer to state courts in resolving state tax disputes. But surely respect for state courts in tax cases does not at the same time give those courts authority to decline jurisdiction over federal claims. On the contrary, principles of comity — respect for the laws of another jurisdiction — require precisely the opposite result. *Cf. Nutbrown v. Munn*, 811 P.2d 131, 138 (Or. 1991) (noting that neither principles of comity nor the Tax Injunction Act "control[s] state trial procedure"), *cert. denied*, 502 U.S. 1030 (1992). Thus, while the Tax Injunction Act gives states the right to be free from federal court interference in state tax matters, it by no means gives them the right to be free from federal claims.

CONCLUSION

For the foregoing reasons, the Federation supports the position of the Petitioners and urges the Court to reverse the decision of the Oklahoma Supreme Court.

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. STATE COURTS SHOULD NOT BE REQUIRED TO USE THE REMEDIES PROVIDED BY 42 U.S.C. §1983 WHEN A STATE TAX VIOLATES THE COMMERCE CLAUSE, SO LONG AS THE STATE PROVIDES A PLAIN, SPEEDY AND EFFICIENT STATE REMEDY. 6

A. Requiring State Courts to Implement the Federal Remedies Provided by 42 U.S.C. §1983 in Place of State Remedies Would be Contrary to the Deference to State Remedies and Procedures Required by the Tax Injunction Act, 28 U.S.C. §1341, and to the Provisions of 42 U.S.C. §1983, Because It Would Substitute General Federal Remedies for the Specific Taxpayer Remedies Crafted by Each State. 6

1. States Have the Right to Fashion Their Own Remedies in State Tax Cases. 7

2. Problems With Requiring the Use of §1983 Remedies in State Tax Cases. 12

B. Allowing Taxpayers with a Plain, Speedy and Efficient State Remedy to Pursue Remedies under 42 U.S.C. §1983 Will Place an Unjustified Strain on States' Resources and Disrupt State Tax Schemes, and is Unnecessary as a Means of Deterring Violations of the Commerce Clause. 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Ashland Oil, Inc. v. Caryl,
497 U.S. 918 (1990) 11

Associated Industries of Missouri v. Lohman,
___ U.S. ___, 114 S. Ct. 1815,
128 L. Ed. 2d 639 (1994) 11

Blanchard v. Bergeron,
489 U.S. 95 (1989) 20

Blum v. Stenson,
465 U.S. 886 (1984) 22

Burlington v. Dague,
505 U.S. ___, 112 S. Ct. 2638,
120 L. Ed. 2d 449 (1992) 22, 25

California v. Grace Brethren Church,
457 U.S. 393 (1982) 8, 11

Chapman v. Houston Welfare Rights Organization,
441 U.S. 617 (1978) 12

Community Federal Savings & Loan Association v. Director of Revenue,
752 S.W. 2d 799 (Mo. 1988),
cert. den. 488 U.S. 893 (1988) 16

D.H. Holmes Company v. McNamara,
486 U.S. 31 (1988) 23

Dennis v. Higgins,
498 U.S. 274 (1991) 12

Dows v. Chicago,
11 Wall. 110 (1871) 7

Evans v. Jeff D.,
475 U.S. 717 (1986) 20

F.M.C. Stores Co. v.
Morris Plains,
100 N.J. 425, 495 A. 2d 1313 (1985) 16

Fair Assessment in Real Estate
Association v. McNary,
454 U.S. 100 (1981) . . . . . *passim*

Farrar v. Hobby,
506 U.S. ___, 113 S. Ct. 566,
121 L. Ed. 2d 494 (1992) 25

Felder v. Casey,
487 U.S. 131 (1988) 15

First National Bank v.
Board of County Commissioners,
264 U.S. 450 (1924) 14

Franchise Tax Board of California
v. Alcan Aluminum Ltd.,
493 U.S. 331 (1990) 9

Great Lakes Dredge & Dock
Co. v. Huffman,
319 U.S. 293 (1943) 8, 9

Harper v. Virginia Department of Taxation,
509 U.S. ___, 113 S. Ct. 2510,
125 L. Ed. 2d 74 (1993) 9, 11, 25

Heck v. Humphrey,
___ U.S. ___, 114 S. Ct. 2364,
129 L. Ed. 2d 383 (1994) 18

Hensley v. Eckerhart,
461 U.S. 424 (1983) 20

Hillsborough v. Cromwell,
326 U.S. 620 (1945) 8

Hutto v. Finney,
437 U.S. 678 (1977) 25

*Izumi Seimitsu Kogyo Kabushi
Kaisha v. U.S. Philips Corp.*,
510 U.S. ___, 114 S. Ct. 425,
126 L. Ed. 2d 396 (1993) 12

Jackson County Iron Co. v. Musolf,
134 Wis. 2d 95, 369 N.W. 2d 323 (1986) 16

*James M. Beam Distilling
Company v. Georgia*,
501 U.S. ___, 111 S. Ct. 2439,
115 L. Ed. 2d 481 (1991) 11, 25

Matthews v. Rogers,
284 U.S. 521 (1931) 7

*McKesson v. Florida Alcoholic
Beverage Commission*,
496 U.S. 18 (1990) . . . . . *passim*

Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981) 18

Monroe v. Pape, 365 U.S. 167 (1961) 12

North Carolina Department of Transportation v. Crest Street Community Center, 479 U.S. 6 (1986) 24

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982). 14

Preiser v. Rodriguez, 411 U.S. 475 (1973) 17

Pulliam v. Allen, 466 U.S. 556 (1983) 21

Reich v. Collins, ___ U.S. ___, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994) 11

Rhodes v. Stewart, 488 U.S. 1 (1988) 25

Riverside v. Rivera, 477 U.S. 561 (1986) 22

Riverview Properties Ltd. v. South Dakota State Board of Equalization, 439 N.W. 2d 820 (S.D. 1989) 16

Rosewell v. LaSalle National Bank,
450 U.S. 503 (1980) . . . . . *passim*

Schweiker v. Chilicky,
487 U.S. 412 (1988) 18

Smith v. Robinson,
468 U.S. 992 (1984) 18

Swaggart Ministries v. California Board of Equalization,
493 U.S. 378 (1990) 14

Texas State Teachers' Association v. Garland Independent School District,
489 U.S. 782 (1989) 21

Tully v. Griffin, Inc.,
429 U.S. 73 (1976) 8, 9

Will v. Michigan Dept. of State Police,
491 U.S. 68 (1988) 13, 14, 19

Wilson v. Garcia,
471 U.S. 261 (1985) 15

STATUTES AND LEGISLATIVE MATERIALS:

26 U.S.C. §7430(b)(3)(A) 21

26 U.S.C. §7430(c)(1)(B)(iii) 21

26 U.S.C. §7430(c)(4)(A)(i) 21

26 U.S.C. §7430(c)(4)(A)(iii) 21

28 U.S.C. §1341 . . . . . *passim*

28 U.S.C. §2412(d)(2)(B) 21

42 U.S.C. §1983 . . . . . *passim*

42 U.S.C. §1988 . . . . . *passim*

81 Cong. Rec. 1416 (1937) 24

Iowa Code §421.60(4) 23

Ky. Rev. Stat. §453.260 23

Mont. Code Ann. §25-10-711 23

N.D. Cent. Code §28-32-21.1 23

N.J.Stat.Ann. 54:51A-22 23

N.J.Stat.Ann. 59:49-14 15

N.J.Stat.Ann. 59:49-18(a) 15

N.J.Stat.Ann. 59:51A-13 15

R.I. Gen. Laws §42-92-1 23

Texas Tax Code §112.052(b) 15

Texas Tax Code §112.151(c) 16

OTHER MATERIALS:

State Tax Appeal Systems (1994) 16

No. 94-688

In the

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari
To the Oklahoma Supreme Court

BRIEF OF THE STATES OF NEW JERSEY, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici States administer comprehensive tax schemes which include specific remedial procedures for taxpayers who wish to obtain tax refunds or to challenge particular tax laws. These procedures are designed to assure each State's fiscal integrity through the prompt and efficient collection of tax revenues, while at the same time affording aggrieved taxpayers a clear and certain means of obtaining relief from taxes alleged to have been assessed improperly. The specific tax collection procedures crafted by each of the amici States, including their remedial components, are crucial to the

States' ability to control their fiscal affairs and to function as independent sovereign entities.

Petitioners claim that in addition to providing relief to taxpayers pursuant to state law, state courts must also provide the federal remedy of 42 U.S.C. §1983 whenever taxpayers successfully challenge a state tax on the basis of the Commerce Clause of the United States Constitution. This approach would disrupt each State's method of providing taxpayer relief and would permit attorneys' fees to be awarded under 42 U.S.C. §1988 as a matter of course to taxpayers who successfully challenged a State tax as violative of the Commerce Clause, regardless of the good faith of the State taxing authorities or of the constitutional sufficiency of any other relief provided to the taxpayer by the State's remedial scheme.

Amici oppose any requirement obligating State courts to use the remedies of 42 U.S.C. §1983 as a substitute for adequate and comprehensive state remedies in taxpayer lawsuits based on the Commerce Clause. Accordingly, amici urge this Court to provide that in cases challenging a state tax, relief for state violations of the federal rights afforded by the Commerce Clause must be obtained exclusively through the use of each State's specific remedial scheme, so long as that scheme meets due process standards.

SUMMARY OF ARGUMENT

Petitioners claim they are entitled to supplement the relief they received from the Oklahoma Supreme Court under state law for a violation of the Commerce Clause through state taxation with additional relief that is available

under 42 U.S.C. §1983, namely attorneys' fees under 42 U.S.C. §1988. However, allowing a remedy under §1983 to supplant a taxpayer's plain, speedy and efficient state remedy would be contrary to the determination of Congress and this Court that in the area of state taxation, federal intrusion should be minimized. 28 U.S.C. §1341; *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981). In addition, allowing a §1983 remedy as a substitute for state remedies would permit petitioner and others to bypass vital state procedures that both Congress and this Court have decided cannot be circumvented, creating the potential for significant disruption to the states' fiscal operations and integrity.

States are dependent on efficient and predictable tax collection to conduct their operations, and have devised tax appeal methods that are consistent with this need. This Court has consistently recognized that in light of this fact, federal court intrusion into state tax matters should be kept to a minimum and should only be exerted when federal rights will otherwise be lost. In passing the Tax Injunction Act, 28 U.S.C. §1341, Congress also recognized that in state tax matters, state courts and remedial processes should have primacy. Thus, although this Court has sometimes struck down state taxes as violative of the Commerce Clause, it has consistently allowed the states to determine the specific retroactive relief to be awarded in those cases, subject only to federal due process requirements.

Requiring state courts to provide relief for violations of the Commerce Clause pursuant to the federal standards of 42 U.S.C. §1983 is inconsistent with this Court's jurisprudence. The lenient attorneys' fees provisions of 42

U.S.C. §1988 are not appropriately applied in the area of state taxation. In addition, interstate businesses asserting a violation of the Commerce Clause under §1983 could also attempt to bypass the statutes of limitation, notice requirements, administrative remedies, and other procedures that the states have crafted for specific taxes and tax schemes. Thus, the deference to adequate state tax remedies and procedures that this Court has consistently observed would be destroyed.

Even if a taxpayer has a federal "right" under the Commerce Clause as that term is used in 42 U.S.C. §1983, this does not mean that he is entitled to the federal remedies provided by that statute. When a taxpayer asserts that a state tax violates the Commerce Clause and seeks a refund, the state is the real party in interest. However, a state is not a "person" subject to suit under §1983. Thus, a state that provides adequate tax relief for a Commerce Clause violation is providing relief pursuant to state law, not pursuant to §1983. Consistent with both 28 U.S.C. §1341 and 42 U.S.C. §1983, if this specific state remedy complies with due process, it should be the exclusive remedy available for a state's violation of the Commerce Clause.

If a state remedy for a Commerce Clause violation meets due process standards, the only effect of also requiring a remedy under §1983 will be to allow attorneys' fees based on the standards of 42 U.S.C. §1988 and to enable interstate businesses to bypass state tax procedures in favor of the more lenient standards of §1983. Use of these relaxed standards will significantly increase litigation over both taxes and fees and significantly discourage the full defense of those lawsuits. The result will likely be a substantial strain on state

resources and fiscal health, as well as the loss of state control over tax case management. In an area as critical as state taxation, states should be able to set their own standards for attorneys' fees, limitations periods, and other important procedures, so long as due process requirements are met.

Moreover, it is unnecessary to require states to award attorneys' fees pursuant to the lesser standards of §1988 as a means of deterring Commerce Clause violations. Based on this Court's precedents, when a state has enforced a tax that violates the Commerce Clause, it must provide predeprivation process or meaningful retroactive relief. In addition, this Court's decisions setting aside state taxes normally apply retroactively to all tax cases that are not final or time-barred. These standards subject states to potentially enormous liability for Commerce Clause violations at a time when state resources and taxing ability are already severely limited. Under the circumstances, adding the "deterrent" of attorneys' fees pursuant to §1988 is not legally or factually justified.

For these reasons, this Court should recognize a state remedy that complies with due process as the exclusive form of relief available when a taxpayer asserts that a state tax violates the Commerce Clause. Accordingly, it should affirm the judgment of the Oklahoma Supreme Court.

ARGUMENT

I. STATE COURTS SHOULD NOT BE REQUIRED TO USE THE REMEDIES PROVIDED BY 42 U.S.C. §1983 WHEN A STATE TAX VIOLATES THE COMMERCE CLAUSE, SO LONG AS THE STATE PROVIDES A PLAIN, SPEEDY AND EFFICIENT STATE REMEDY.

A. Requiring State Courts to Implement the Federal Remedies Provided by 42 U.S.C. §1983 in Place of State Remedies Would be Contrary to the Deference to State Remedies and Procedures Required by the Tax Injunction Act, 28 U.S.C. §1341, and to the Provisions of 42 U.S.C. §1983, Because It Would Substitute General Federal Remedies for the Specific Taxpayer Remedies Crafted by Each State.

Petitioners in this case successfully challenged an Oklahoma tax in the state courts on the basis of the Commerce Clause and obtained both declaratory relief setting the tax aside and refunds of all taxes paid since 1987. Petition for Writ of Certiorari at A-3, *National Private Truck Council, Inc. v. Oklahoma Tax Commission* (No. 94-688). Nevertheless, petitioners assert that the relief provided by the Oklahoma state courts was insufficient because it did not include certain relief available under 42 U.S.C. §1983, specifically an award of attorneys' fees pursuant to 42 U.S.C. §1988.[1] Petitioners thus ask this Court to require

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[1] As is apparent from petitioners' merits brief, the only relief petitioners now seek is an award of attorneys' fees under §1988. Pet. Brief at 20, n.11.

state courts to provide all relief available pursuant to §1983 when taxpayers succeed on a claim under the Commerce Clause, even if such relief is wholly unnecessary to enable the taxpayers to vindicate their federal rights.

Mandating state courts to provide this form of federal relief in taxpayer suits based on the Commerce Clause is contrary to both the Tax Injunction Act, 42 U.S.C. §1341, and 42 U.S.C. §1983. Moreover, requiring state courts to implement the remedies of §1983 in tax cases will represent a near-total repudiation of the well established principle of deference to adequate state procedures and remedies in the area of state taxation. Accordingly, this Court should make clear that taxpayers who challenge a state tax on the basis of the Commerce Clause must pursue the explicit remedies provided by state tax law rather than the remedies provided by §1983, so long as the state remedies comply with due process and constitute a "plain, speedy and efficient remedy" under 42 U.S.C. §1341.

1. States Have the Right to Fashion Their Own Remedies in State Tax Cases.

The general legal principle that a taxpayer challenging a state tax must avail himself of state remedies, even if his challenge is based on a federal ground, is indisputably longstanding. This principle is based on the fact that the States rely on taxation to carry on their functions, and that it is therefore critically important that federal courts interfere with State tax collection and enforcement as little as possible, particularly if the federal right can be asserted without federal court involvement. *Dows v. Chicago*, 11 Wall. 108, 110 (1871); *Matthews v. Rogers*, 284 U.S. 521,

525-26 (1931); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-99 (1943); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). It was on the basis of this principle that federal equity courts traditionally declined to enjoin state officers from enforcing allegedly unconstitutional state tax schemes, so long as the state provided an adequate legal remedy for any violation of the federal right asserted. See *Hillsborough v. Cromwell*, 326 U.S. 620, 622-23 (1945).

In 1937, Congress passed the Tax Injunction Act, 28 U.S.C. §1341. That Act prohibits federal district courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under State law where a "plain, speedy and efficient remedy" may be had in the State courts. Thus, the Act codifies the federal courts' tradition of declining to enjoin state tax collection if violations of federal rights can be remedied through state court proceedings. *Fair Assessment in Real Estate Association v. McNary, supra*, 454 U.S. at 107-110 (1981).

The "plain, speedy and efficient remedy" that is required under 28 U.S.C. §1341 has never been construed to compel state courts to use the same remedies as their federal counterparts might have used. Rather, the requirement has been interpreted as a procedural command, and a "plain, speedy and efficient remedy" has been deemed to exist if it is clear that a taxpayer can fully assert his federal rights in the state forum and have them fully adjudicated. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512-521 (1980); *California v. Grace Brethren Church*, 457 U.S. 393, 411-412 (1982). See also *Fair Assessment in Real Estate Association v. McNary, supra*, 454 U.S. at 116, n.8 (describing the phrase "plain, speedy and efficient

remedy" as a reference to the "obvious precept that plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights would not thereby be lost."). Based on this analysis, this Court has held that states must provide taxpayer remedies that comply with federal due process requirements, *McKesson v. Florida Alcoholic Beverage Commission*, 496 U.S. 18 (1990), but has never required states to provide to taxpayers the substantive remedies available under §1983, which include attorneys' fees under 42 U.S.C. §1988. See *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

Although the operative effect of 28 U.S.C. §1341 is to control federal court jurisdiction over state tax cases rather than to control the substance of state remedial schemes, this Court has consistently recognized the importance of deference to state remedies in the area of taxation and the underlying need to allow states to control their fiscal operations. Thus, this Court has repeatedly declined to allow federal courts to adjudicate taxpayer claims raising federal questions, based on the plain language of §1341, a recognition that federal interference will likely disrupt state tax collection and enforcement, and a recognition that Congress enacted §1341 based on the "imperative need of a State to administer its own fiscal operations" by applying its own remedies. *Tully v. Griffin*, *supra*, 429 U.S. at 73; *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 522. See also *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990); *Fair Assessment in Real Estate v. McNary*, *supra*, 454 U.S. at 112-114; *Great Lakes Dredge & Dock Co. v. Huffman*, *supra*, 319 U.S. at 297-99.

In addition, this Court has always given states the opportunity to determine the specific relief that should be provided in a lawsuit challenging a state tax under federal law and has required only that the relief comply with federal due process requirements. In *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, the key case on this point, this Court held that a state was required to provide meaningful "backward-looking relief" to taxpayers who had been required to pay taxes which violated the Commerce Clause, because the taxpayers had been deprived of property and the Due Process Clause required either predeprivation process or the certainty of retroactive relief following the improper deprivation. 496 U.S. at 31. However, this Court did not require the state to provide a specific refund or any other specific relief. Indeed, the Court stated that the state retained flexibility to respond to the determination of invalidity and that it could take any number of actions to rectify the prior discrimination against interstate commerce. The suggested steps included granting a refund to the taxpayer, imposing a retroactive assessment on other taxpayers to create a nondiscriminatory scheme in hindsight, or some combination of these approaches, as well as the use of shortened statutes of limitation for refund claims. 496 U.S. at 40-41 and 45. The Court thus left the state free to choose the form of relief it would provide, "so long as that relief satisfies the minimum federal requirements we have outlined." 496 U.S. at 52. Those minimum requirements do not include attorneys' fees under 42 U.S.C. §1983 and §1988.

Following *McKesson*, this Court has continued to allow states to determine, subject to due process constraints, the precise form of retroactive relief they will provide when a taxpayer successfully challenges a state tax on a federal

basis. See, *e.g.*, *Associated Industries of Missouri v. Lohman*, ___ U.S. ___, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994); *Harper v. Virginia Department of Taxation*, *supra*; *James M. Beam Distilling Company v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). This approach recognizes that the remedy in a state tax case is a question of state law -even where a federal right is violated - and that the only federal constraint is that the state provide a clear and certain remedy that complies with federal due process requirements. See *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918 (1990); *James M. Beam*, *supra*; *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994). The approach also reflects the Court's longstanding recognition that states must be able to control tax collection and assessment so as to assure their continuing fiscal integrity, without unwarranted intrusion by the federal courts. See *California v. Grace Brethren Church*, *supra*, 457 U.S. at 408-413.

As 28 U.S.C. §1341 and these precedents demonstrate, both Congress and this Court have determined that the precise fashioning of remedies in state tax cases, even those involving the violation of a federal right, should be left to the states. Requiring state courts to include remedies under 42 U.S.C. §1983 in state tax cases would constitute an extreme departure from this well-founded deference to state remedies and would indirectly accomplish what this Court has consistently refused to allow directly: a federally-devised formula for relief in state tax cases.

2. Problems With Requiring the Use of §1983 Remedies in State Tax Cases.

In *Dennis v. Higgins*, 498 U.S. 274 (1991), this Court held that the Commerce Clause conferred individual federal rights within the meaning of 42 U.S.C. §1983. However, the decision in *Dennis* does not obligate states to provide all of the relief available pursuant to §1983 in addition to a plain, speedy and efficient state remedy that comports with due process. As has been repeatedly recognized, 42 U.S.C. §1983 does not create any federal rights, but simply provides a federal remedy and forum for their enforcement. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961). In *Dennis*, this Court described the petitioner's federal "rights" under the Commerce Clause as encompassing the right to engage in interstate commerce free from state discrimination and the right to obtain relief in a state forum pursuant to the due process standards enunciated in *McKesson v. Florida Alcoholic Beverage Commission*, *supra*. It did not hold that petitioner's rights included either the use of §1983 procedures or the availability of attorneys' fees pursuant to §1988 in state tax cases.[2]

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[2] In *Dennis*, the issue of whether the existence of a federal right under §1983 required state courts to use §1983 remedies in state tax cases was not fairly included in the question presented for review. Petition for Writ of Certiorari at i, *Dennis v. Higgins* (No. 89-1555). Therefore, it should not be concluded that the Court decided this issue in that case. Cf. *Izumi Seimitsu Kogyo Kabushi Kaisha v. U.S. Philips Corp.*, 510 U.S. ___, 114 S. Ct. 425, 126 L. Ed. 2d 396 (1993). Petitioners apparently concede this fact, as they assert only that it was "implicit" in *Dennis* that state courts are required to provide attorneys' fees under §1988. Pet. Brief at 30.

There is no need to provide a federal forum for the assertion of federal rights in state tax cases so long as those rights can be raised and adjudicated in a state forum, as occurred in this case. Indeed, if a state forum in which to raise federal rights is available and provides a plain speedy and efficient state remedy, 28 U.S.C. §1341 eliminates the federal forum as an option. *Rosewell v. LaSalle National Bank*, *supra*. Thus, in the case of challenges to state taxes, the provisions of §1341 directly conflict with one of the major purposes of §1983: providing a federal forum for the vindication of federal rights.

In addition, other inconsistencies between §1983 actions, 28 U.S.C. §1341, and this Court's precedents demonstrate that §1983 is an improper remedial vehicle to use in state tax cases. Taxpayers alleging that a state tax violates the Commerce Clause generally seek both declaratory relief and tax refunds, thereby bringing an action in which the State is indisputably the real party in interest. However, neither a State nor a state official sued in his official capacity is a "person" amenable to a suit for damages under §1983, because Congress did not intend to "include the sovereign states among those persons against whom §1983 actions would lie." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68 (1988). Thus, existing state remedial schemes which make tax refunds available for Commerce Clause violations are completely distinct from §1983 remedies and go beyond the relief that could be obtained from a state under §1983.

Moreover, while persons can bring a §1983 action for damages against a state official in his individual capacity, an allegation that a state tax law violates the Commerce Clause

clearly is not directed at the individual conduct of state tax officials, but at official state legislative activity. Thus, if plaintiffs are allowed to challenge state tax laws on the basis of §1983, state tax officials will be exposed to inappropriate requests for relief or to strained pleadings which inappropriately characterize their official conduct in enforcing state tax law as some form of individual misconduct. Since states are not proper defendants under §1983, neither states nor state officials should be compelled to expend resources to defend these types of actions. Cf. *Will*, *supra*, 491 U.S. at 71 (allowing a §1983 suit against a state officer in his official capacity "would allow petitioner to circumvent congressional intent by a mere pleading device.").

Similarly, requiring states to use §1983 remedies when adjudicating challenges to state taxes would create other conflicts. For example, exhaustion of administrative remedies is generally not required in a §1983 action. *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982). However, administrative remedies are a major component of many State tax schemes, and this Court has consistently provided that a State may require those remedies to be exhausted before a state tax can be challenged in court on a federal ground. See *Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378, 397-98 (1990); *First National Bank v. Board of County Commissioners*, 264 U.S. 450 (1924)(holding that a lawsuit seeking a tax refund based on the 14th Amendment was barred for failure to exhaust administrative remedies); *Fair Assessment in Real Estate v. McNary*, *supra*, 454 U.S. at 137-38 (Brennan, J., concurring).

Requiring states to use §1983 to adjudicate tax cases could allow taxpayers to bypass not only administrative remedies, but also any notice requirements specific to state tax schemes and any statutes of limitation specific to tax challenges. See *Felder v. Casey*, 487 U.S. 131 (1988)(holding that Wisconsin could not apply its notice of claim requirements to a §1983 action); *Wilson v. Garcia*, 471 U.S. 261 (1985)(the statute of limitations for §1983 actions is the state's statute of limitations for personal injury actions). These results would be completely at odds with the Tax Injunction Act, which provides that states can apply their own remedies and procedures in tax cases, as well as with the decisions of this Court cited above recognizing the states' rights to follow their own tax schemes when addressing federal claims, so long as those schemes comport with due process. See, *e.g.*, *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, 496 U.S. at 45 (states can provide shortened statutes of limitation for tax refund cases when providing remedies in tax cases).

While statutes of limitation and notice requirements applicable to taxes vary by state and by tax, they bear no relationship to the statutes of limitation applicable to §1983 actions.[3] The specific timeframes set for challenging taxes

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[3] For example, New Jersey taxpayers have 90 days to bring a complaint in tax court challenging a decision of the Director of the Division of Taxation, up to four years to claim a tax refund from the Director in the absence of a tax assessment, and 90 days to challenge the denial of a refund claim. N.J.Stat.Ann. 59:51A-13; N.J.Stat.Ann. 59:49-14; N.J.Stat.Ann. 59:49-18(a). However, the New Jersey statute of limitations for personal injury actions based on negligence (and thus for §1983 actions) is two years. Similarly, in Texas a person who wishes to pay a tax under protest must bring an action within 90 days of the date the tax is paid or within 30 days after a refund claim is denied. Texas Tax

enable states to anticipate tax revenues with accuracy and therefore to plan and budget efficiently. States must be able to project with a high degree of certainty the amount of revenues they will receive during each budget cycle and have adopted rigid limitation and notice requirements for this reason. Indeed, statutes of limitation applicable to tax challenges are generally considered jurisdictional and inflexible. See, *e.g.*, *F.M.C. Stores Co. v. Morris Plains*, 100 N.J. 418, 425, 495 A. 2d 1313 (1985); *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W. 2d 794, 799 (Mo. 1988), cert. den. 488 U.S. 893 (1988); *Riverview Properties Ltd. v. South Dakota State Board of Equalization*, 439 N.W. 2d 820 (S.D. 1989). Cf. *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 369 N.W. 2d 323 (1986). In contrast, statutes of limitation for personal injury actions (and thus §1983 actions) may be subject to a state's equitable tolling considerations, discovery of injury rules, and other subjective criteria. Thus, introducing §1983 statutes of limitation into state tax schemes is likely to bring uncertainty into an area that is now extremely certain and in which certainty is critical.

In other instances when the provisions of §1983 directly conflicted with Congress' desire to defer to state proceedings and remedies, this Court has declined to allow

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Code §112.052(b); Texas Tax Code §112.151(c). As in New Jersey, however, the Texas statute of limitations for personal injury actions is two years. A summary of the timeframes applicable in each state to challenge state taxes is contained in State Tax Appeal Systems (1994), a document prepared by the Federation of Tax Administrators which has been lodged with the Court. As that summary indicates, states generally allow a taxpayer from 30 to 120 days to appeal the denial of a refund claim or to appeal a final tax assessment to the state courts. State Tax Appeal Systems, Appendices G and L.

§1983 to interfere with or supplant those state proceedings. In *Fair Assessment in Real Estate Association v. McNary*, *supra*, for instance, this Court held that a state tax could not be challenged in federal court under §1983, notwithstanding the otherwise broad scope of that statute, where a plain, speedy and efficient remedy was available in state court.[4] Similarly, in *Rosewell v. LaSalle National Bank*, *supra*, another case in which a state tax was challenged pursuant to §1983, this Court also did not allow a state tax remedy that it deemed "plain, speedy and efficient" to be bypassed through a federal court action.

Likewise, this Court has refused to countenance the use of §1983 to bypass important state proceedings in the non-tax context. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for example, this Court held that a prisoner seeking to obtain release from confinement through a §1983 action could not use that action in lieu of seeking a writ of habeas corpus, because Congress had intended prisoners to exhaust adequate state remedies in a habeas action and this intent would be wholly frustrated if the exhaustion requirement could be evaded through a §1983 action. 411 U.S. at 489. The Court described the habeas exhaustion requirement as "rooted in comity" and as designed to give a state the first opportunity to correct its errors. 411 U.S. at 491.

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[4] The Court recognized in *McNary* that the State of Missouri would entertain plaintiff's §1983 claim in its courts. However, there is no indication in *McNary* that the Court intended to sanction the use of §1983 in state courts as a means of avoiding normal state procedures in tax cases or of getting attorneys' fees under §1988. See, *e.g.*, 454 U.S. at 116 n. 8 ("plaintiffs seeking protection of federal rights in federal courts should be remitted to their state remedies if their federal rights would not thereby be lost.").

More recently, in *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), this Court again declined to allow a prisoner to avoid the exhaustion of state remedies required in a habeas action by bringing an action under §1983. The Court recognized that allowing the §1983 action to proceed would completely undermine the habeas exhaustion requirement; it therefore held that because the prisoner's §1983 claim was based on an assumption of illegal confinement, the claim would not accrue unless and until his conviction had been set aside.

Identical considerations underlie 28 U.S.C. §1341 and this Court's practice of allowing states to use their own processes to provide relief in tax cases, regardless of whether taxes are challenged on state or federal grounds. When Congress has established a specific remedial scheme for the violation of a federal right and has demonstrated that it wishes this scheme to be the exclusive method by which to obtain relief, a plaintiff cannot avoid the scheme by seeking potentially more favorable relief under 42 U.S.C. §1983. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 20-21 (1981);[5] *Smith v. Robinson*, 468 U.S. 992 (1984). Cf. *Schweiker v. Chilicky*, 487 U.S. 412 (1988)(a *Bivens* remedy was not available to obtain damages after improperly withheld social security benefits had been obtained, based on the alternative, comprehensive

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[5] In *Sea Clammers*, the Court did not allow a person asserting a violation of the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 to bring a private action for damages under §1983, based on the specific statutory remedies provided in those Acts. The Court concluded that the existence of these express remedies foreclosed implied private actions and supplanted any remedy that would otherwise be available under §1983.

remedial scheme provided by Congress). Comprehensive state remedial schemes that allow taxpayers to challenge state taxes on the basis of federal law must be regarded as providing an alternative and exclusive remedy, based on 28 U.S.C. §1341 and on this Court's precedents.[6]

For all these reasons, petitioners' attempt to obtain supplemental relief under 42 U.S.C. §1983 should be rejected and this Court should hold that if a "plain, speedy and efficient" state remedy exists for a violation of the Commerce Clause through taxation, an action under §1983 cannot be pursued. This approach will be fully consistent with 28 U.S.C. §1341 and with this Court's decisions, which allow states to control their fiscal affairs by controlling the precise type of relief that taxpayers will receive, subject to due process requirements. It will also comport with this Court's longstanding recognition that the federal courts should not interfere with state tax procedures, as well as with this Court's refusal to allow the use of §1983 actions as a means of avoiding comprehensive state remedies that are

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[6] Petitioners devote the bulk of their brief to asserting that state courts must enforce federal rights and cannot discriminate against federal causes of action except on some neutral state ground. Amici do not dispute this general proposition. However, petitioners have failed to draw the important distinction between enforcement of federal rights in state courts and the requirement of federal remedies under §1983, and have failed to recognize that a federal right need not always be enforced through the mechanism of §1983. Moreover, §1983 was enacted specifically to provide a federal forum for the vindication of federal rights which it was feared the states would not otherwise enforce. *Will v. Michigan*, *supra*, 491 U.S. at 66. As this case demonstrates, state courts do enforce federal rights in the tax area and do set aside state taxes that violate the Commerce Clause. Finally, petitioners' general assertions also fail to recognize the unique nature of state tax cases and Congress' determination when it enacted 28 U.S.C. §1341 to subject federal rights to state remedial schemes.

entitled to federal deference and that Congress has determined must be pursued.

B. Allowing Taxpayers with a Plain, Speedy and Efficient State Remedy to Pursue Remedies under 42 U.S.C. §1983 Will Place an Unjustified Strain on States' Resources and Disrupt State Tax Schemes, and is Unnecessary as a Means of Deterring Violations of the Commerce Clause.

For the reasons stated above, recognizing a cause of action under §1983 would conflict with the deference to State tax remedies and procedures which Congress and this Court have determined is necessary. In addition, requiring relief under §1983 and attorneys' fees under §1988 would have other significantly adverse effects on state resources and would provide an unneeded inducement for increased litigation by interstate businesses.

When it enacted 42 U.S.C. §1988 in 1976, Congress intended to assure that individuals would not be deterred or prevented from seeking to vindicate their federal civil rights pursuant to §1983 because they could not afford to retain competent legal counsel. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989); *Evans v. Jeff D.*, 475 U.S. 717 (1986). It therefore decided to upset the traditional "American Rule" in civil rights cases and to provide that a prevailing party could be awarded reasonable attorneys' fees, regardless of whether the party would have been entitled to fees under the "private attorney general" theory previously used by the federal courts. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Following the enactment of §1988, the numbers of cases filed pursuant to §1983 increased dramatically, as did the

amount of litigation over fees. *Pulliam v. Allen*, 466 U.S. 522, 556 (1983)(Powell, J., dissenting). Today, the availability of §1983 remedies, coupled with the availability of §1988 attorneys' fees, remains a highly significant source of litigation.

As the proliferation of §1983 actions since enactment of §1988 suggests, §1988 has been an effective vehicle to ensure enforcement of civil rights laws by individual plaintiffs. However, it is an exceedingly poor vehicle to ensure that state taxes comply with constitutional requirements, especially where state taxes are alleged to violate the Commerce Clause.[7]

First, allowing fees to be awarded in Commerce Clause cases based on the lenient standards of §1988 will undoubtedly significantly encourage litigation by interstate business and will simultaneously discourage or chill the full defense of those lawsuits by states. Pursuant to §1988, a "prevailing" plaintiff is a plaintiff who is successful on any significant issue, without regard to the defendant's good or bad faith in litigation. *Texas State Teachers' Association v.*

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[7] The fact that §1988 is a completely inappropriate standard for awarding attorneys' fees in state tax cases is underscored by the very different standard that is applicable to the Internal Revenue Service. Taxpayers who challenge their federal taxes are entitled to attorneys' fees only if they establish, among other things, that the government's position in the litigation was not "substantially justified." Moreover, attorneys' fees are not generally available in declaratory judgment actions, and are normally capped at $75 per hour. Only individuals and businesses with a net worth below a specified amount qualify to receive fees. 26 U.S.C. §7430(b)(3)(A); 26 U.S.C. §7430(c)(1)(B)(iii); 26 U.S.C. §7430(c)(4)(A)(i); 26 U.S.C. §7430(c)(4)(A)(iii); 28 U.S.C. §2412(d)(2)(B).

Garland Independent School District, 489 U.S. 782 (1989). Moreover, a "reasonable" fee under §1988 is based on market rates without regard to actual legal costs and may exceed the amount of damages obtained. *Blum v. Stenson*, 465 U.S. 886 (1984); *Riverside v. Rivera*, 477 U.S. 561 (1986).

Given these standards for awarding fees, there can be no doubt that prudent state officials who are faced with §1983 lawsuits in tax cases will be hesitant to defend them fully and will be consistently tempted to compromise tax cases. See *Fair Assessment in Real Estate Association v. McNary*, *supra*, 454 U.S. at 115. Thus, allowing §1983 suits will place an obvious strain on the states' fiscal resources, as states are simultaneously likely to become liable for increased attorneys' fees, become engaged in increased litigation involving both taxes and fees, and be deterred from collecting all taxes assessed. Moreover, these adverse impacts will likely occur many times over, because allowing taxpayers to use §1983 as a remedial vehicle will undoubtedly boost both the number of non-meritorious lawsuits filed to challenge state taxes and spawn an additional round of litigation based only on obtaining fees. Cf. *Burlington v. Dague*, 505 U.S. ___, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992).

Second, requiring states to apply §1983 remedies in state tax cases will have other disruptive and unnecessary impacts on each state's management of its fiscal affairs. As discussed in Point I, *supra*, taxpayers filing claims under §1983 could claim immunity from the administrative procedures, notice requirements and statutes of limitation specific to state tax schemes. If, as is likely, the amount of

tax litigation increases based on the increased availability of attorneys' fees and on the claimed ability to bypass state tax procedures, the potential for disruption and confusion in each states' tax system will be substantial.

In addition, while taxpayers are currently subject to each state's laws regarding attorneys' fees, taxpayers filing §1983 actions would be subject to a general federal attorneys' fee provision entirely beyond the control of state legislatures. In an area as critical to independent sovereignty as taxation, the standards governing attorneys' fees should be left to the affected sovereign. If they are not, states will lose their ability to control tax litigation and therefore to control taxation.[8]

The States recognize full well that they may not violate the Commerce Clause through taxation. However, states are entitled to have interstate commerce pay its fair share of state taxes. *D.H. Holmes Company v. McNamara*, 486 U.S. 24, 31 (1988). Allowing interstate businesses to receive §1983 remedies will supply this group of taxpayers with an unneeded additional inducement to challenge state taxes, namely more lenient attorneys' fees provisions and the apparent ability to bypass state tax procedures. Nothing in the Commerce Clause requires this result. Moreover, supplying this litigation lure may cause the very effects

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[8] Some states have adopted attorneys' fees provisions for state tax cases that are similar to the standards applicable to the Internal Revenue Service referenced in footnote 7, *supra*. See, *e.g.*, N.J.Stat.Ann. 54:51A-22; Iowa Code §421.60(4); R.I. Gen. Laws §42-92-1 *et seq.* See also Mont. Code Ann. §25-10-711 (allowing fees where the state has brought or defended an action that was frivolous or pursued in bad faith); N.D. Cent. Code §28-32-21.1; Ky. Rev. Stat. §453.260.

which Congress sought to eliminate by enacting the Tax Injunction Act, namely an ability by interstate business to exercise excessive control over its tax liability. *Rosewell v. LaSalle National Bank*, *supra*, 450 U.S. at 525-27 (1980).[9]

If states with plain, speedy and efficient remedies already allow taxpayers to challenge a state tax on a federal ground and provide refund procedures, allowing an additional §1983 claim is at best redundant and at worst simply an invitation for increased litigation geared only towards obtaining attorneys' fees. In other contexts, this Court has recognized that the use of §1983 solely as a means to an attorneys' fee is not appropriate and has not allowed it. *North Carolina Department of Transportation v. Crest Street Community Center*, 479 U.S. 6 (1986)(plaintiffs who won an administrative proceeding could not subsequently bring a

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[9] Before passage of the Tax Injunction Act, the availability of a federal forum and the potential for obtaining injunctive relief allowed some interstate businesses to withhold state taxes and to "determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1416 (1937). Similarly, the availability of attorneys' fees under §1983 will likely discourage states from fully defending lawsuits based on the Commerce Clause and encourage them to compromise tax liability, thus giving taxpayer plaintiffs added control over the amount of taxes they must pay. Although any group of taxpayers asserting a violation of a federal right through taxation could also theoretically take advantage of §1983, they could not do so as readily as interstate businesses could. A state that wishes to have interstate business pay its fair share of taxes must devise formulas to accomplish this purpose, which may then be subject to immediate attack based on their practical effects. Thus, unlike any other type of taxpayers, interstate businesses constitute a readily identifiable group with a readily identifiable means of facially attacking state taxes. It may be necessary for interstate business to have this means of attack as a way to enforce the Commerce Clause. However, it is not necessary to add to this mix the further litigation lure of attorneys' fees.

separate §1983 action to obtain fees). Cf. *Rhodes v. Stewart*, 488 U.S. 1 (1988)(where the §1983 judgment had no impact because the prisoner had already been released, no fees could be awarded); *Farrar v. Hobby*, 506 U.S. ___, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)(a plaintiff who sought $17 million in damages but was awarded $1 was the "prevailing" party but was not entitled to attorneys' fees); *Burlington v. Dague*, *supra*. This Court should do likewise in this case, by declining to allow a §1983 claim to be used in addition to or in place of an existing and constitutionally adequate state remedy solely as a way to obtain fees.[10]

Awarding attorneys' fees pursuant to the standards of 42 U.S.C. §1988 has been described as a way of deterring or penalizing conduct that violates federal law. *Hutto v. Finney*, 437 U.S. 678, 690-91 (1977). However, in Commerce Clause litigation the states are already subject to a number of significant deterrents. First, pursuant to 28 U.S.C. §1341, states must allow their taxes to be challenged and fully adjudicated on federal grounds or risk having that adjudication occur in a federal forum. Second, pursuant to *McKesson v. Florida Alcoholic Beverage Commission*, *supra*, if state taxes violate the Commerce Clause, states must provide predeprivation process or meaningful retroactive relief. Third, pursuant to *James M. Beam Distilling Co. v. Georgia*, *supra*, and *Harper v. Virginia Department of*

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[10] In *Farrar v. Hobby*, *supra*, this Court held that it was unreasonable to award fees under §1988 where the relief obtained was virtually non-existent in comparison to the relief sought. Section 1988, of course, provides that reasonable fees "may" be awarded. This Court can interpret this permissive language to preclude an award of attorneys' fees in state tax cases, just as it interpreted the term "reasonable" fees to preclude a fee award in *Farrar*.

Taxation, *supra*, this Court's decisions invalidating state taxes are normally applied retroactively to all cases that are not final and not time-barred.

The combined effect of these precedents is that states that violate the Commerce Clause through taxation are subject to enormous potential liability that can only be addressed through a series of difficult options.[11] Moreover, this liability has at times been imposed even where the violation was not reasonably foreseeable. This provides more than a sufficient deterrent to states not to adopt tax schemes which violate the Commerce Clause, particularly in an era when the states' resources and taxing abilities are already strained and they simply cannot afford to incur additional liability. Under the circumstances, imposing attorneys' fees pursuant to the standards §1988 as yet another "deterrent" is completely unwarranted.

For all these reasons, this Court should not accept petitioners' invitation to replace constitutionally adequate state tax remedies and procedures with the remedies of 42 U.S.C. §1983 whenever a state tax is challenged on the basis of the Commerce Clause. Requiring state courts to use §1983 remedies in such cases will allow taxpayers to bypass the plain, speedy and efficient state remedies that are already available and that Congress and this Court have recognized must be pursued. In addition, imposition of §1983 remedies will conflict with existing state procedures pertaining to tax collection and assessment, causing significant and

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[11] The fiscal impacts of this liability can be reduced by raising the taxes of other taxpayers, an option that is neither practical nor realistic in many cases. The alternative, reducing state services, may adversely affect other innocent taxpayers.

unwarranted disruption. Use of §1983 remedies will also increase tax litigation, discourage and undermine defense of state tax schemes, and strain existing state fiscal resources. Given the significant deterrents that already discourage states from violating the Commerce Clause, requiring states with plain, speedy and efficient tax remedies to also implement §1983 remedies is unwarranted, unwise and unnecessary.

CONCLUSION

For all of the foregoing reasons, the judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., *et al.*,
Petitioners,
v.
OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1983 provides a remedial scheme for state taxpayers.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. CONGRESS DID NOT INTEND FOR SECTION 1983 TO PROVIDE A REMEDIAL SCHEME FOR STATE TAXPAYERS	6
A. Section 1983's Tort Based System Of Liability Rules Would Significantly Disrupt State Tax Administration	8
B. Section 1983 Did Not Abrogate Principles Of Equity Barring Injunctive Relief In Taxpayer Suits	12
C. Because The States Have Long Provided Adequate Remedies To Challenge Taxes, Congress Did Not Intend For Section 1983 To Provide A Remedial Scheme For State Taxpayers	19
II. A CLAIM THAT A STATE TAX UNCONSTITUTIONALLY DISCRIMINATES IS NOT RIPE FOR SECTION 1983 PURPOSES UNTIL THE STATE'S ADMINISTRATIVE AND JUDICIAL PROCESSES HAVE FAILED TO CURE THE DISCRIMINATION	22
A. Like Takings Claims, Discriminatory Tax Claims Are Not Ripe Until The State's Remedial Process Fails To Provide Constitutionally Adequate Redress For The Deprivation of Property	23

TABLE OF AUTHORITIES—Continued

Page

B. Because Of The Unique Importance Of Tax Administration To State Sovereignty, A Discriminatory Tax Claim Is Not Ripe Until The State's Remedial Process Has Upheld The Tax 27

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Adam v. Litchfield, 10 Conn. 127 (1834)	20
Babcock v. Town of Granville, 44 Vt. 105 (1872)	20
Barcroft Info. Group, Inc. v. Comptroller, 603 A.2d 1289 (Md. App. 1992)	10
Barrow v. Davis, 46 Mo. 394 (1870)	14
Bob Jones Univ. v. Simon, 416 U.S. 725 (1974)	20
Boise Artesian Hot and Cold Water Co. v. Boise City, 213 U.S. 276 (1909)	7
Buck v. Leggett, 813 S.W.2d 872 (Mo. 1991)	10
Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993)	17
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	29
California v. Grace Brethren Church, 457 U.S. 393 (1982)	7, 9, 15, 20
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918)	18
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	16, 17
City of Philadelphia v. The Collector, 72 U.S. (5 Wall.) 720 (1866)	4, 19, 20, 21
City of Richmond v. Daniel, 55 Va. (14 Gratt.) 385 (1858)	20
Cook County v. Chicago, B. & Q. R.R., 35 Ill. 460 (1864)	14
Delaware Bankers Ass'n v. Division of Rev., 298 A.2d 352 (Del. Ch. 1972)	9
Dennis v. Higgins, 498 U.S. 439 (1991)	11, 18
Dodd v. City of Hartford, 25 Conn. 232 (1856)	14
Dodge v. Osborn, 240 U.S. 118 (1916)	14
Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871)	*passim*
Edelman v. Jordan, 415 U.S. 651 (1974)	26-27
Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981)	*passim*
Felder v. Casey, 487 U.S. 131 (1988)	8, 10, 13
First Nat'l Bank v. Board of Comm'rs, 264 U.S. 450 (1924)	6, 7, 28
First Nat'l Bank of Sturgis v. Watkins, 21 Mich. 483 (1870)	20

TABLE OF AUTHORITIES—Continued

Page

Floyd v. Gilbreath, 27 Ark. 675 (1872) 14
Gorham Mfg. Co. v. State Tax Comm'n, 266 U.S. 265 (1924) 28
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 7, 9, 20
Greene v. Mumford, 5 R.I. 472 (1858) 14
Gregory v. Ashcroft, 501 U.S. 452 (1991) 7, 11
Grim v. Weissenberg School Dist., 57 Pa. 433 (1868) 20
Hannewinkle v. Georgetown, 82 U.S. (15 Wall.) 547 (1872) 13
Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510 (1993) 26
Harvey & Boyd v. Town of Olney, 42 Ill. 336 (1866) 20
Hays v. Hogan, 5 Cal. 241 (1855) 20
Heck v. Humphrey, 114 S.Ct. 2364 (1994) 8, 11, 17
Hess v. Port Auth. Trans-Hudson Corp., 115 S.Ct. 394 (1994) 26
Hogan v. Musolf, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992) 10
Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) 5, 23
Hudson v. Palmer, 468 U.S. 517 (1984) 27
Hurley v. Kincaid, 285 U.S. 95 (1932) 25
Imbler v. Pachtman, 424 U.S. 409 (1976) 17
Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) 25
Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) 28
Judd v. Town of Fox Lake, 28 Wis. 583 (1871) 14
Lester v. Baltimore, 29 Md. 415 (1868) 20
Look v. Industry, 51 Me. 375 (1863) 20
Mathews v. Eldridge, 424 U.S. 319 (1976) 27
Matthews v. Rodgers, 284 U.S. 521 (1932) 7, 13, 14
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 6
McDonald v. Murphree, 45 Miss. 705 (1871) 14

TABLE OF AUTHORITIES—Continued

	Page
McKesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)	*passim*
McNeese v. Board of Education, 373 U.S. 668 (1963)	8
Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986)	8
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	22
Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1923)	28-29
Monroe v. Pape, 365 U.S. 167 (1961)	8, 10
Moore v. Sims, 442 U.S. 415 (1979)	6, 29
Nutbrown v. Munn, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992)	10
Parratt v. Taylor, 451 U.S. 527 (1981)	23
Patsy v. Board of Regents, 457 U.S. 496 (1982)	8, 10, 21
People ex rel. Otsego County Bank v. Board of Supervisors, 51 N.Y. 401 (1873)	20
Perez v. Ledesma, 401 U.S. 82 (1971)	2, 28, 29
Phillips v. City of Stevens' Point, 25 Wis. 594 (1870)	20
Preiser v. Rodriguez, 411 U.S. 475 (1973)	18
Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830)	6
Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)	29
Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981)	7
Savings & Loan Society v. Austin, 46 Cal. 415 (1873)	14
Shaw v. Becket, 61 Mass. (7 Cush.) 442 (1851)	20
Singer Sewing Machine Co. v. Benedict, 229 U.S. 481 (1913)	7
Smith v. Wade, 461 U.S. 30 (1983)	9
Standard Alaska Prod. Co. v. Department of Rev., 773 P.2d 201 (Alaska 1989)	10
Susquehanna Bank v. Board of Supervisors, 25 N.Y. 312 (1862)	14
Tenney v. Brandhove, 341 U.S. 367 (1951)	17

TABLE OF AUTHORITIES—Continued

	Page
Tuttle v. Everett, 51 Miss. 27 (1875)	20
United States v. Bass, 404 U.S. 336 (1971)	21
United States v. California, 113 S.Ct. 1784 (1993)	7
Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)	*passim*
Williamson County Reg. Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	*passim*
Wilson v. Garcia, 471 U.S. 261 (1985)	9, 10
Wood v. Strickland, 420 U.S. 308 (1975)	17
Younger v. Harris, 401 U.S. 37 (1971)	18, 30
Zinermon v. Burch, 494 U.S. 113 (1990)	27

Constitutional Provisions:

Cal. Const. art. XIII, § 32	9
La. Const. art. VII, § 3(A)	9

Statutes:

Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475 (codified at 26 U.S.C. § 7421)	16, 20
Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981)	21
Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13	13
Declaratory Judgment Act, 28 U.S.C. §§ 2201-02	20
Tax Injunction Act, 28 U.S.C. § 1341	9, 21
42 U.S.C. § 1983	17
42 U.S.C. § 1988	21, 22
Ala. Code § 40-2A-7(b)(5)(d.3)	9
Ala. Code § 40-3-24	10
Ala. Code § 40-3-25	9
Ala. Code § 40-18-47	10
Alaska Stat. § 09.10.070	10
Alaska Stat. § 43.05.240(d)	10
Cal. Civ. Proc. Code § 340(3)	1a
Cal. Rev. & Tax Code § 6932	10
Cal. Rev. & Tax Code § 6933	1a
D.C. Code Ann. § 47-3307	9
D.C. Code Ann. § 47-3310	10
Del. Code Ann. tit. 10, § 342	9

TABLE OF AUTHORITIES—Continued

	Page
Ky. Rev. Stat. Ann. § 139.760(3)	9
Ky. Rev. Stat. Ann. § 141.235(1)	9
Md. Tax-Gen. Code § 13-505	9
Md. Tax-Gen. Code § 13-514	10
Me. Rev. Stat. tit. 36, § 5301	9
Mich. Comp. Laws § 205.22	29
Mich. Comp. Laws § 205.22(1)	1a
Mich. Comp. Laws § 205.28(1)(b)	9
Mich. Comp. Laws § 600.5805(8)	1a
Minn. Stat. § 289A.43	9
Minn. Stat. § 289A.50(7)	1a
Minn. Stat. § 541.07(1)	1a
Mo. Rev. Stat. § 143.841.3	1a
Mo. Rev. Stat. § 143.841.5	29
Mo. Rev. Stat. § 516.120(4)	1a
Mont. Code Ann. § 15-1-402	1a
Mont. Code Ann. § 15-1-402(2)	10
Mont. Code Ann. § 27-2-204(1)	1a
Nev. Rev. Stat. § 372.670	9
N.J. Stat. Ann. § 2A:14-2	1a
N.J. Stat. Ann. § 54:49-18	10
N.J. Stat. Ann. § 54:51A-1	29
N.J. Stat. Ann. § 54:51A-14	1a
N.M. Stat. Ann. § 7-1-22	10
N.M. Stat. Ann. § 7-1-26(A)	1a
N.M. Stat. Ann. § 37-1-8	1a
N.Y. Tax Law, art. 40, § 2016	29
Okla. Stat. tit. 12, § 95	2a
Okla. Stat. tit. 68, § 226(b)	2a
Or. Rev. Stat. § 305.275	10
Or. Rev. Stat. § 305.405	29
Or. Rev. Stat. § 305.565(2)-(4)	10
S.C. Code Ann. § 12-47-10	9
S.D. Codified Laws Ann. § 10-27-1	9
S.D. Codified Laws Ann. § 10-27-2	2a
S.D. Codified Laws Ann. § 15-2-14(3)	2a
Tenn. Code Ann. § 67-1-1801(c)(1)	10
Tex. Civ. Prac. & Rem. Code § 16.003	2a

TABLE OF AUTHORITIES—Continued

	Page
Tex. Tax Code Ann. § 112.001	29
Tex. Tax Code Ann. § 112.052(b)	2a
Tex. Tax Code Ann. § 112.101(a)	10
Tex. Tax Code Ann. § 112.151	10
Va. Code Ann. § 58.1-1831	9

Other Authorities

Thomas M. Cooley, *A Treatise On The Law Of Taxation* (1886)	13-14
Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment* 16 Mich. L. Rev. 69 (1917)	19
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INTEREST OF THE *AMICI CURIAE*

Amici National Conference of State Legislatures, Council of State Governments, National Governors' Association, National Association of Counties, International City/County Management Association, National League of Cities, U.S. Conference of Mayors and National Institute of Municipal Law Officers are organizations

whose members include state, county, and municipal governments and officials throughout the United States; *amici* and their members have a compelling interest in legal issues that affect state and local governments. *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, is vitally interested in legal issues affecting the ability of its member States to devise effective and innovative tax policies in light of changing economic conditions.

The Court has long recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). The issue in this case, whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a remedial scheme for state taxpayers, is of fundamental importance to *amici* and their members. Every State has created remedial schemes for its taxpayers which "are generally complex and necessarily designed to operate according to established rules." *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). The application of the Court's Section 1983 jurisprudence to state tax disputes would result in the preemption of many of these rules and lead to widespread disruption of state tax administration.

Because the Court's decision will have a substantial impact on the integrity of state tax administration, *amici* submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. No function of government is more essential to sovereignty than the administration and collection of tax revenues. The Court has thus recognized "the important

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment*, 454 U.S. at 102. The issue in this case—whether 42 U.S.C. § 1983 provides a remedial scheme for state taxation—likewise counsels for restraint.

The consequence of holding that Section 1983 provides a remedy for state taxation extends far beyond petitioners' assertion of their right to the "recovery of attorneys' fees under § 1988." Pet. 10. Section 1983 jurisprudence is ill-suited to taxpayer challenges; its imposition would mark an unparalleled degree of federal interference in state affairs. For example, many States require that a taxpayer exhaust administrative remedies before bringing a judicial challenge. The Court has held, however, that a Section 1983 claimant cannot be required to exhaust a State's administrative remedies. Many States impose statutes of limitation in taxpayer challenges which are substantially shorter than their limitation period applicable in personal injury actions. Yet the Court has held that it is the latter which provides the applicable limitation period in a Section 1983 action. Finally, while many States prohibit the awarding of injunctive relief in taxpayer challenges, Section 1983 authorizes a "suit in equity" and petitioners maintain that, under the statute, they are entitled to injunctive relief. *See* Pet. Br. 20 n.11. As the Court noted in *Fair Assessment*, the "very maintenance of [a Section 1983 taxpayer] suit itself would intrude on the enforcement of" state tax systems. 454 U.S. at 114.

The Forty-Second Congress, however, never intended for Section 1983 to provide a remedial scheme for state taxation, as an examination of the remedies sought by petitioners demonstrates. Petitioners acknowledge that Section 1983 does not provide for a refund suit against the State. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68-69 (1989). But at common law, it was the standard practice that taxpayers must seek relief for

unconstitutional taxation through their remedies at law, most commonly a suit in assumpsit which, despite the fictional pleading device of suing the collector, was recognized as being a *de facto* refund action against the sovereign. *See City of Philadelphia v. The Collector,* 72 U.S. (5 Wall.) 720, 731-33 (1866).

Petitioners ignore the historic reluctance of courts of equity to intervene in taxpayer disputes. But as the Court has recognized, shortly before Section 1983's enactment it had held as a matter of federal law that a court of equity lacked jurisdiction to enjoin an unconstitutional state tax where the taxpayer had an adequate remedy at law. *See Fair Assessment,* 454 U.S. at 102 (quoting *Dows v. City of Chicago,* 78 U.S. (11 Wall.) 108, 110 (1871)). While *Dows* undoubtedly was required by principles of comity, its holding merely reflected the prevailing practice in the States and the Federal government of denying taxpayers equitable relief where an adequate remedy at law exists. In enacting Section 1983, the Forty-Second Congress did not intend to abrogate this venerable rule, which is founded on the recognition that the extraordinary remedy of an injunction "may derange the operations of government, and thereby cause serious detriment to the public." *Dows,* 78 U.S. (11 Wall.) at 110.

Moreover, if petitioners are correct that Section 1983 provides equitable remedies for state taxpayers, then the Forty-Second Congress rejected the universally available and less intrusive remedy of a refund action in favor of the disruptive and extraordinary remedy of an injunction. This conclusion makes no sense. A Congress, which included a Senate whose members were selected by their respective state legislatures, would not have imposed such a disruptive remedial scheme on the States. The Forty-Second Congress simply never intended that Section 1983 would provide a remedial scheme for state taxation.

2. Even if the Court concludes that Section 1983 provides a remedial scheme for state taxation, petitioners'

claim was never ripe for Section 1983 purposes. While a State can act through its legislature, executive or judiciary, *see Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 289-90 (1913), the Court has nonetheless recognized that there are some constitutional rights which, by their very nature, are not violated unless and until the State's administrative and judicial processes fail to provide a claimant with adequate relief. *See, e.g., Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). As a matter of federal constitutional law, claims alleging the deprivation of such rights are not ripe unless the claimant has utilized the procedure provided under state law for obtaining meaningful relief and the State has denied such relief. *Id.* at 195.

Claims alleging that a State has discriminated in taxation should be treated in the same manner. The Court has recognized that a State may cure asserted discriminatory tax treatment by granting refunds to those who paid at the higher tax rate, collecting additional taxes at a higher rate from those who were benefitted by a lower rate, or creating a scheme combining "partial refund[s]" and "partial retroactive assessments" to create a non-discriminatory scheme. *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 39-41 (1990). This flexibility, which derives from the Eleventh Amendment's traditional concern for the protection of state treasuries, as well as the principles of comity and federalism embodied in the text and structure of the Constitution, requires that claims of discriminatory taxation cannot be deemed ripe for Section 1983 purposes unless a taxpayer has pursued the State's administrative and judicial remedies for curing discrimination and been denied constitutionally adequate relief.

State tax administration is a highly specialized and complex function. The Court has thus long held that a state taxpayer who does not exhaust the administrative

remedies provided under state law cannot bring a judicial challenge. *See, e.g., First Nat'l Bank v. Board of Comm'rs,* 264 U.S. 450, 455-56 (1924). State tax codes are frequently complex and may well be ambiguous. State courts share responsibility with state tax commissions for the administration and interpretation of state tax codes. "State courts are the principal expositors of state law. Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims,* 442 U.S. 415, 429-30 (1979). It is especially true in matters of state taxation that "federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in state courts." *Fair Assessment,* 454 U.S. at 108 n.6. (citation omitted). Indeed, in many instances a claim may be resolved favorably to the taxpayer as a matter of either state statutory or constitutional law. Thus, in matters of taxation, a State's action is not final and a claim of unconstitutional discrimination is not ripe until the State's judicial process has rendered a final judgment upholding the tax.

ARGUMENT

I. CONGRESS DID NOT INTEND FOR SECTION 1983 TO PROVIDE A REMEDIAL SCHEME FOR STATE TAXPAYERS

This Court has long recognized that no function of government is more essential to sovereignty than the administration and collection of tax revenues. *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 561 (1830); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 425 (1819). Federal interference with this function, whether by Congress or the courts, has grave potential to disrupt the operation of state governments. Indeed, shortly before the enactment of Section 1983, the Court noted that:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1871). In a long line of cases the Court has recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment*, 454 U.S at 102.[2]

The issue in this case—whether state taxpayers have a remedy under Section 1 of the Ku Klux Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983—likewise counsels for restraint. As the Court recently reaffirmed, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). So long as a State's remedial scheme for illegal taxation comports with the Due Process Clause of the Fourteenth Amendment, its design and operation involve some of the most fundamental decisions a State makes in the exercise of its sovereignty.

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[2] *See also United States v. California*, 113 S.Ct. 1784, 1787-92 (1993); *California v. Grace Brethren Church*, 457 U.S. 393, 407-17 (1982); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522-28 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-301 (1943); *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932); *First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 455-56 (1924); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 485-88 (1913); *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U.S. 276, 282-84 (1909).

The consequence of holding that Section 1983 provides a remedial scheme for state taxation extends far beyond petitioners' entitlement to recover attorney's fees under 42 U.S.C. § 1988. As explained below, Section 1983 jurisprudence is ill-suited to taxpayer challenges; its imposition on state tax systems would mark a degree of unparalleled federal interference in state affairs. Because there is no evidence that Congress ever intended to impose Section 1983's remedial scheme on state tax systems, the Court should decline petitioners' invitation to judicially impose this scheme on the States.

A. Section 1983's Tort Based System Of Liability Rules Would Significantly Disrupt State Tax Administration

Since this Court revived Section 1983 from its nearly century long dormancy in *Monroe v. Pape*, 365 U.S. 167 (1961), it has articulated numerous rules of decision to adjudicate the varied categories of claims brought under it. The Court, for example, has noted that a state official can be sued under Section 1983 for injunctive relief. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989). It has held that a Section 1983 claimant cannot be required to exhaust a State's administrative remedies. *See Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982); *McNeese v. Board of Education*, 373 U.S. 668, 671-72 (1963); *Monroe*, 365 U.S. at 183. The Court has also held that a state statute requiring that a claimant provide written notice of a claim to a government agency or official before suing is preempted as inconsistent with the purposes of Section 1983. *See Felder v. Casey*, 487 U.S. 131, 153 (1988).

In still other cases the Court has articulated rules of decision premised on the notion that " '[S]ection 1983 creates a species of tort liability.' " *Heck v. Humphrey*, 114 S.Ct. 2364, 2370 (1994) (quoting *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986)). For example, the Court has held that the stat-

ute of limitations in a Section 1983 suit is the State's limitation period applicable to personal injury actions, not the statute applicable to an analogous state law claim. *See Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985). The Court has also held that a state official can be sued for punitive damages under Section 1983. *See Smith v. Wade*, 461 U.S. 30, 56 (1983).

In *Fair Assessment*, the Court noted that "the very maintenance of [a Section 1983 taxpayer] suit itself would intrude on the enforcement of the state scheme." 454 U.S. at 114. There the Court recognized that the principles of comity and federalism which bar the federal courts from awarding injunctive and declaratory relief in taxpayer suits, *see* 28 U.S.C. § 1341; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), likewise bar federal courts from awarding monetary relief in taxpayer suits brought under Section 1983 because such suits are "fully as intrusive as . . . equitable actions." [3] 454 U.S. at 113.

The intrusiveness of a Section 1983 taxpayer suit is not diminished simply because the claim is brought in state court. Many States prohibit the award of injunctive relief [4] or condition its award by requiring that the tax-

[3] The Tax Injunction Act, 28 U.S.C. § 1341, had long barred federal courts from granting equitable relief in taxpayer challenges. The Court has also held that the Tax Injunction Act prohibits a federal court from granting declaratory relief holding a state tax unconstitutional. *See California v. Grace Brethren Church*, 457 U.S. 393, 407-11 (1982).

[4] *See, e.g.*, Ala. Code §§ 40-2A-7(b)(5)(d.3), 40-3-25; Cal. Const. art. XIII, § 32; *Delaware Bankers Ass'n v. Division of Rev.*, 298 A.2d 352, 356 (Del. Ch. 1972); Del. Code Ann. tit. 10, § 342; D.C. Code Ann. § 47-3307; Ky. Rev. Stat. Ann. §§ 139.760(3), 141.235 (1); La. Const. Art. VII, § 3(A), Me. Rev. Stat. tit. 36, § 5301; Md. Tax-Gen. Code § 13-505; Mich. Comp. Laws § 205.28(1)(b); Minn. Stat. § 289A.43; Nev. Rev. Stat. § 372.670; S.C. Code Ann. § 12-47-10; S.D. Codified Laws Ann. § 10-27-1; Va. Code Ann. § 58.1-1831.

payer either pay the amount in dispute or post a bond.[5] Yet Section 1983 authorizes a "suit in equity" and petitioners maintain that, under the statute, they are entitled to injunctive relief. *See Will*, 491 U.S. at 71 n.10; Pet. Br. 20 n.11. Many States require the taxpayer to file a refund claim with the taxing authority and/or exhaust an administrative remedy prior to bringing a judicial challenge.[6] Yet *Felder* holds that Section 1983 preempts a State's notice of claim provision, *see* 487 U.S. at 153, and numerous cases hold that a Section 1983 plaintiff is not required to exhaust administrative remedies. *See, e.g., Patsy*, 457 U.S. at 500, 516; *cf. Fair Assessment*, 454 U.S. at 113-14 (citing *Monroe*, 365 U.S. 167). Many States impose statutes of limitation in taxpayer challenges which are substantially shorter than their statutes governing personal injury actions,[7] which under *Wilson* is the applicable limitations period in a Section 1983 suit. *See* 471 U.S. at 280.

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[5] *See, e.g.*, Tenn. Code Ann. § 67-1-1801(c)(1); Tex. Tax Code Ann. § 112.101(a). Other States require the posting of a bond if the taxing authority determines that collection of the tax "will be jeopardized" or that the taxpayer's position is "frivolous." Or. Rev. Stat. § 305.565(2)-(4); *see also* N.J. Rev. Stat. § 54:49-18.

[6] *See, e.g., Standard Alaska Prod. Co. v. Department of Rev.*, 773 P.2d 201 (Alaska 1989); Ala. Code §§ 40-3-24, 40-18-47; Cal. Rev. & Tax. Code § 6932; D.C. Code Ann. § 47-3310; *Barcroft Info. Group, Inc. v. Comptroll* 603 A.2d 1289, 1297 (Md. App. 1992); Md. Tax-Gen. Code Ann. § 13-514; *Buck v. Leggett*, 813 S.W.2d 872 (Mo. 1991); Mont. Code Ann. § 15-1-402(2); N.M. Stat. Ann. § 7-1-22; Or. Rev. Stat. § 305.275; *Nutbrown v. Munn*, 811 P.2d 131, 135-36 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992); Tex. Tax Code Ann. § 112.151; *Hogan v. Musolf*, 471 N.W.2d 216, 223 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992).

[7] *Compare, e.g.*, Alaska Stat. § 43.05.240(d) (requiring filing of appeal of Tax Commission's decision within thirty days of decision) *with* Alaska Stat. § 09.10.070 (providing two year limitation for personal injury action). *See also* statutes collected in the Appendix to this brief.

As the foregoing demonstrates, far more is at issue here than simply whether, as petitioners assert (Pet. 10), those who successfully challenge a state tax as violative of their federal rights are entitled to attorney's fees. If state taxpayers are entitled to seek relief under Section 1983 for taxes which putatively violate their federal rights, state tax administration will be thrown into disarray as taxpayers invoke this Court's Section 1983 jurisprudence to argue that it preempts state laws limiting the period for filing suit, requiring the payment of taxes under protest and the exhaustion of administrative remedies, and barring the award of injunctive relief.

This result might be understandable if the Forty-Second Congress had ever considered the impact of subjecting state tax systems to Section 1983 suits. But as several members of this Court have noted, the Forty-Second Congress never envisioned the scope of claims that Section 1983 would eventually encompass. *See, e.g., Heck*, 114 S.Ct. at 2374 (Thomas, J., concurring) (noting that Section 1983 has been expanded "far beyond the limited scope [it] was originally intended to have"); *Dennis v. Higgins*, 498 U.S. 439, 451-52 (1991) (Kennedy, J., dissenting, joined by the Chief Justice).

In fact, the Forty-Second Congress never considered the impact of subjecting to Section 1983 suits such a functionally important aspect of state sovereignty as its system for the administration and collection of taxes. In the absence of persuasive evidence of Congress' consideration of the issue, the Court should decline petitioners' invitation to judicially impose this remedy. "[T]he important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment*, 454 U.S. at 102, require that Congress affirmatively make such a choice. *Cf. Gregory*, 501 U.S. at 460-61.

B. Section 1983 Did Not Abrogate Principles Of Equity Barring Injunctive Relief In Taxpayer Suits

Contrary to petitioners' assertion that Congress intended to provide remedies under Section 1983 for unconstitutional taxation, an examination of the remedies sought by petitioner—injunctive and declaratory relief as well as a refund—merely demonstrates the point that Congress has never considered the issue. Having acknowledged that *Will* bars a refund suit against the State, *see* Br. of National Private Truck Council *et al.* in Oklahoma Supreme Ct. 9 n.7, petitioners invoke *Will*'s footnote stating that a suit against an official in his or her official capacity for injunctive relief is not a suit against the State. *See* Pet. Br. 20 n.11 (citing 491 U.S. at 71 n.10). Petitioners thus assert that because they "would have been entitled to injunctive and declaratory relief [against the members of the Tax Commission] under § 1983, they are entitled to recover their attorney's fees and costs under § 1988." Pet. Br. 20 n.11.

This is truly an extraordinary assertion, assuming as it does that *Will*'s dictum settled the question of whether Section 1983 provides equitable remedies to those challenging state taxes. But to suggest as much is to ignore the historic and continuing reluctance of courts of equity to intervene in taxpayer disputes. Indeed, shortly before Section 1983's enactment, the Court held in *Dows* as a matter of federal law that a court of equity lacked jurisdiction to enjoin an unconstitutional tax where the taxpayer had an adequate remedy at law. 78 U.S. (11 Wall.) at 110; *see also Fair Assessment*, 454 U.S. at 102. As the Court stated in *Dows*:

> Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition.

> There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. . . .
>
> No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked.

78 U.S. (11 Wall.) at 109-10; *see also Hannewinkle v. Georgetown*, 82 U.S. (15 Wall.) 547, 548-49 (1872).[8] Of note, the Forty-Second Congress vested the federal courts, where *Dows* applied, with exclusive jurisdiction over Section 1983 suits. *See Felder*, 487 U.S. at 158 (O'Connor, J., dissenting); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. It is thus implausible to argue, as petitioners do, that Section 1983 authorizes injunctive relief in taxpayer suits.[9]

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[8] Sixty years after *Dows* and the enactment of Section 1983, the Court summarized its jurisprudence as follows:

> Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved . . . .

Matthews v. Rodgers, 284 U.S. 521, 525-26 (1932).

[9] The common law exception authorizing an injunction to prevent a multiplicity of suits is of no aid to petitioners. This exception, the purpose of which was to avoid "the attendant trouble and ex-

Moreover, while the decision in *Dows* undoubtedly was required by principles of comity, it also reflected the venerable equitable principle, which was widely accepted throughout the States, that a court of equity will not intervene where an adequate remedy at law exists. *See* 78 U.S. (11 Wall.) at 110-112.[10] Such a rule is of particular importance to the operation of sovereign gov-

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pense" of multiple suits, *see* Thomas M. Cooley, *A Treatise On The Law Of Taxation* 770 (1886), was, like the class action itself, equity's response to the rules of procedure in actions at law which did not allow for the permissive joinder of parties and claims. Indeed, many courts recognized the exception's potential for disrupting the fiscal operations of government and thus limited it to those instances in which each claimant could show that they themselves would be required to pursue multiple suits to recover taxes paid. *See, e.g., Matthews*, 284 U.S. at 529-30 (dismissing complaint filed on behalf of three hundred taxpayers seeking to enjoin tax alleged to burden interstate commerce; "as to each [taxpayer] a single suit at law brought to recover the tax will determine its constitutionality"); *Dodge v. Osborn*, 240 U.S. 118, 122-23 (1916) (dismissing suit for injunction in challenge to federal income tax sought on the ground that "unless the taxes are enjoined many [refund] suits by other persons will be brought"; taxpayers "allege[d] no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced . . . which . . . if recognized as a basis for equitable jurisdiction would take every case where a tax was assailed because of its unconstitutionality out of the provisions of [the Anti-Injunction Act], and thus render it nugatory").

To the extent the common law exception permitted injunctive relief where a taxpayer would have to file numerous suits, the advent of modern procedural rules has rendered this exception obsolete.

[10] *See also Floyd v. Gilbreath*, 27 Ark. 675 (1872); *Savings & Loan Society v. Austin*, 46 Cal. 415 (1873); *Dodd v. City of Hartford*, 25 Conn. 232 (1856); *Cook County v. Chicago, B. & O. R.R.*, 35 Ill. 460 (1864); *McDonald v. Murphree*, 45 Miss. 705 (1871); *Barrow v. Davis*, 46 Mo. 394 (1870); *Susquehanna Bank v. Board of Supervisors*, 25 N.Y. 312 (1862); *Greene v. Mumford*, 5 R.I. 472 (1858); *Judd v. Town of Fox Lake*, 28 Wis. 583 (1871).

ernments because the extraordinary remedy of an injunction "may derange the operations of government, and thereby cause serious detriment to the public." *Id.* at 110. As the Senate Report accompanying the Tax Injunction Act likewise explained, a suit for injunctive relief allowed corporate taxpayers to withhold from the States and their subdivisions

> taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S. Rep. No. 1035, 75th Cong., 1st Sess. 1, 2 (1937).

The Court recently reaffirmed the continuing vitality of the prohibition against the award of injunctive relief in taxpayer suits:

> Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 37 (1990) (footnote omitted).[11]

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[11] *See also id.* at n. 19 (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982) ("During [prepayment litigation] the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and

Indeed, the potential harm to the effective functioning of governments caused by the award of injunctive relief in taxpayer suits was recognized by Congress itself several years before the enactment of Section 1983. In 1867, Congress took action to protect the federal government from the harms caused by the award of injunctive relief by amending the Internal Revenue laws to provide that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court," Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475, resulting in the consignment of federal taxpayers to their remedies at law.

As the foregoing demonstrates, the prohibition against the awarding of equitable relief in taxpayer suits where an adequate remedy at law existed was of such fundamental importance to the effective functioning of governments at both the state and federal levels that it was already well established at the time of Section 1983's enactment. It is truly implausible to suggest, as petitioners do, that the Forty-Second Congress intended for Section 1983 to abrogate this venerable rule, which was viewed as adequate to protect federal taxpayers. A Congress, whose members "were familiar with common-law principles," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981), and which included a Senate whose members were chosen by, and were accountable to, their respective state legislatures, cannot be presumed to have done so. And given the importance of this rule to the effective operation of governments, it is all the more remarkable to suggest that Congress would do so given the absence in the debates of any indication of such an intent.[12]

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perhaps a shift to the State of the risk of taxpayer insolvency.") (alteration in original and citations omitted)).

[12] Petitioners and their *amicus* National Retail Federation acknowledge that the practice of some federal courts of entertaining tax injunction suits "imposed a financial burden on state and local governments and forced taxing authorities to accept reduced tax

This Court has on numerous occasions declined to give Section 1983 a literal reading when doing so would lead to a result which would unduly intrude on state sovereignty. For example, notwithstanding its language that "[e]very person who, under color of [state law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of [a federal right] shall be liable . . . in an action at law," 42 U.S.C. § 1983, the Court has held that "immunities 'well grounded in history and reason' ha[ve] not been abrogated 'by covert inclusion in the general language' of § 1983." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)); *see also Buckley v. Fitzsimmons*, 113 S.Ct. 2606, 2612-14 (1993); *City of Newport*, 453 U.S. at 258-71; *Wood v. Strickland*, 420 U.S. 308, 318-21 (1975).

Most recently, the Court held that a state prisoner cannot bring a damages suit under § 1983 to challenge the constitutionality of a conviction unless that conviction has been invalidated by either state or federal authority. *Heck*, 114 S.Ct. at 2372. Again, a literal reading of Section 1983 did not foreclose the prisoner's suit. The Court, however, relied on the well-established common law principle that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," to hold that the prisoner had no cause of action under Section 1983. *Id.; see id.* at 2373; *see also*

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payments in lieu of protracted litigation." Pet. Br. 23; *see also* Br. *Am. Cur.* Nat'l Retail Fed. 9. Petitioners and their *amicus* do not explain why requiring state courts to hear Section 1983 taxpayer suits for injunctive relief would impose any less of a burden on state fiscal integrity.

Likewise, the Court's longstanding recognition that a State need not provide injunctive relief in taxpayer suits if it provides an adequate post-deprivation remedy, *see, e.g., McKesson*, 496 U.S. at 37 & n.18 (discussing threat to state fiscal integrity caused by injunctive relief), would be rendered a nullity if state courts must entertain a Section 1983 taxpayer suit for such relief.

Preiser v. Rodriguez, 411 U.S. 475, 489-94 (1973); *cf. Younger v. Harris*, 401 U.S. 37, 53-54 (1971).

A State's interest in its fiscal integrity is surely of the same magnitude as its interest in the finality of criminal convictions. The literal language of Section 1983 notwithstanding, there is no evidence that the Forty-Second Congress intended to abrogate the prohibition against the awarding of injunctive relief in taxpayer suits.[13] And given the longstanding and continuing recognition of this Court, the Congress, and the States that equitable remedies are unduly disruptive of the government's fiscal integrity, petitioners' contention that they are entitled to injunctive relief under Section 1983 must be rejected. The Forty-Second Congress simply never considered the possibility that Section 1983 would provide a remedial scheme of any sort for challenges to state taxes.

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[13] Petitioners assert that "the obligation of state courts to entertain § 1983 claims in state tax cases and to provide attorneys' fees to prevailing plaintiffs under § 1988 was implicit in *Dennis v. Higgins*, 498 U.S. 439 (1991)." Pet. Br. 30. But while *Dennis* held that the dormant commerce clause "confers 'rights, privileges, or immunities,' within the meaning of § 1983," *see* 498 U.S. at 446, it "raise[d] far more questions about the proper conduct of challenges to the validity of state taxation than it answer[ed]." *Id.* at 464 (Kennedy, J., dissenting). To say that the dormant commerce clause confers a right under the Constitution within the meaning of Section 1983, is not to say that Section 1983 provides a remedial scheme for state taxpayers. "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918).

The question in this case—whether Congress, in enacting Section 1983, intended to provide a remedy for state taxpayers—involves a separate inquiry into Congress' purpose to provide either legal or equitable remedies in such cases. Part of this question was answered in *Will*, *see* 491 U.S. at 68, where the Court recognized that Congress did not intend to provide a damages remedy against a State. The remaining part of this question is addressed at pp. 12-22, which demonstrate that Congress never intended to provide equitable remedies to state taxpayers.

C. Because The States Have Long Provided Adequate Remedies To Challenge Taxes, Congress Did Not Intend For Section 1983 To Provide A Remedial Scheme For State Taxpayers

The conclusion that the Forty-Second Congress never considered the question and thus did not intend for Section 1983 to provide a remedial scheme to challenge state taxation is buttressed by this Court's recognition in *Will* that the statute did not abrogate the States' sovereign immunity. *See* 491 U.S. at 67-68. At common law, it was the standard practice that taxpayers must seek relief for unconstitutional taxation through their remedies at law, most commonly a suit in assumpsit which, despite the fictional pleading device of suing the collector, was recognized even then as being a *de facto* refund action against the sovereign. *See, e.g., Dows,* 78 U.S. (11 Wall.) at 10-12; *City of Philadelphia v. The Collector,* 72 U.S. (5 Wall.) 720, 732 (1866) (noting that assumpsit/refund suits were available to challenge taxes in "all, or nearly all, of the several States").

As noted above, petitioners acknowledge that Congress did not abrogate the States' sovereign immunity and thus refund suits are not cognizable under Section 1983. *See Will,* 491 U.S. at 68-69. But given this acknowledgement, it is remarkable that petitioners assert that the Forty-Second Congress intended that Section 1983 provide equitable remedies for state taxation. If petitioners are correct, then the Forty-Second Congress rejected the universally available and less intrusive remedy of a refund action in favor of the disruptive and extraordinary remedy of an injunction. Such a conclusion makes no sense.[14]

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[14] Petitioners have also sought declaratory relief, a statutory remedy unknown to the Forty-Second Congress. *See, e.g.,* Charles A. Wright, *The Law Of Federal Courts* § 100, at 670 (4th ed. 1983); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment,* 16 Mich. L. Rev. 69, 70-73 (1917). Even assuming that as a general matter the Forty-Second Congress intended to authorize declaratory relief in Section 1983

As the foregoing demonstrates, the Forty-Second Congress never intended that Section 1983 would encompass challenges to state taxation. Nor, *amici* submit, was there any reason to. As this Court itself observed several years before the enactment of Section 1983, a remedy in the nature of assumpsit was already available throughout the States. *See Philadelphia v. The Collector*, 72 U.S. (5 Wall.) at 731-32.[15] The traditional justification given for the creation of the Section 1983 remedy—the belief that

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actions, in tax cases it has long been established as a matter of federal law that declaratory relief is functionally indistinguishable from an injunction. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (declaratory relief "may in every practical sense operate to suspend collection of state taxes until the litigation is ended"; "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure"); *see also California v. Grace Brethren Church*, 457 U.S. 393, 408, 411 (1982) ("there is little practical difference between injunctive and declaratory relief"; Tax Injunction Act bars federal courts from issuing declaratory judgments holding state taxes unconstitutional).

In 1935, one year after the enactment of the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Congress amended the act to prohibit the issuance of declaratory relief in cases challenging federal taxes, "thus reaffirming the restrictions set out in the Anti-Injunction Act, [Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475 (codified at 26 U.S.C. § 7421)]," which prohibit suits for injunctive relief in federal tax cases. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974).

[15] *See also, e.g., Hays v. Hogan*, 5 Cal. 241, 243 (1855); *Adam v. Litchfield*, 10 Conn. 127, 131 (1834); *Harvey & Boyd v. Town of Olney*, 42 Ill. 336, 337-38 (1866); *Lester v. Baltimore*, 29 Md. 415, 418 (1868); *Shaw v. Becket*, 61 Mass. (7 Cush.) 442, 443 (1851); *Look v. Industry*, 51 Me. 375, 376 (1863); *First Nat'l Bank of Sturgis v. Watkins*, 21 Mich. 483, 488-90 (1870); *Tuttle v. Everett*, 51 Miss. 27, 28 (1875); *People ex rel. Otsego County Bank v. Board of Supervisors*, 51 N.Y. 401, 405-06 (1873); *Grim v. Weissenberg School Dist.*, 57 Pa. 433 (1868); *Babcock v. Town of Granville*, 44 Vt. 105, 107 (1872); *City of Richmond v. Daniel*, 55 Va. (15 Gratt.) 385, 386 (1858); *Phillips v. City of Stevens' Point*, 25 Wis. 594, 596-97 (1870).

a federal forum was necessary because "state authorities had been unable or unwilling to protect the constitutional rights of individuals," *Patsy*, 457 U.S. at 505 [16]—is simply not true in the tax context. As cases such as *Dows* and *Philadelphia v. The Collector* demonstrate, the understanding contemporaneous with the enactment of Section 1983 was that state forums and remedies were adequate for the vindication of taxpayers' rights.[17]

More importantly, the subsequent and continuing understanding of Congress, as manifested in the Tax Injunction Act, 28 U.S.C. § 1341, is that state forums and remedies are suitable for the vindication of taxpayers' federal rights. Given that Congress, when it specifically considered the question of the adequacy of state taxpayers' remedies, concluded that such remedies should displace federal jurisdiction so long as they are "plain, speedy and efficient," 28 U.S.C. § 1341, it is illogical to impute to it the intent to provide taxpayers with remedies under Section 1983. Because such remedies would mark an undue intrusion into state fiscal affairs, they should not be imposed on the States in the absence of clear direction from Congress. *Cf. Will*, 491 U.S. at 65 ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

There is accordingly no merit to the arguments of petitioners and their *amici* that state courts violate the

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[16] *See also Will*, 491 U.S. at 66.

[17] To the extent that Reconstruction era Congresses may have viewed state procedures as inadequate to protect against racially discriminatory taxes, *see* Br. *Am. Cur.* Nat'l Retail Fed. 11, this problem was addressed in the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981), which specifically prohibits racially discriminatory taxes. Moreover, a prevailing party in a proceeding to enforce 42 U.S.C. § 1981 is entitled to attorney's fees. *See* 42 U.S.C. § 1988.

Supremacy Clause when they decline to hear taxpayer claims which invoke Section 1983. *See, e.g.*, Pet. Br. 14-21. As explained above, the Forty-Second Congress did not intend for Section 1983 to provide a remedial scheme for challenges to state taxation. Rather, state "taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate and complete, and may ultimately seek review of the state decisions in [this] Court." *Fair Assessment*, 454 U.S. at 116 (footnote omitted).[18]

II. A CLAIM THAT A STATE TAX UNCONSTITUTIONALLY DISCRIMINATES IS NOT RIPE FOR SECTION 1983 PURPOSES UNTIL THE STATE'S ADMINISTRATIVE AND JUDICIAL PROCESSES HAVE FAILED TO CURE THE DISCRIMINATION

As explained above, Congress never intended to subject state tax systems to Section 1983 suits. While that should be dispositive, *amici* alternatively submit that petitioners' claim was never ripe for Section 1983 purposes.

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[18] Petitioners also assert that the Oklahoma Supreme Court's refusal to hear their Section 1983 claim is "inconsistent" with the purpose of 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976. *See* Pet. Br. 31-36. As petitioners reason, "[t]he basic Congressional purpose in enacting § 1988 was to ensure that all persons who are required to resort to legal action to vindicate their federal rights, when those rights are infringed by persons acting under color of state law, can recover the costs of those actions, including reasonable attorneys' fees." *Id.* at 32.

The flaw in this argument is that it presupposes the existence of a Section 1983 remedy to challenge state taxation. *See* 42 U.S.C. § 1988. Moreover, Congress can withdraw a Section 1983 remedy (and with it the right to recover attorney's fees) by providing for an exclusive remedial scheme. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981) (holding that the provision of express remedies in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.*, foreclosed "any remedy that otherwise would be available under § 1983"). The enactment of the Tax Injunction Act demonstrates such a purpose with respect to state taxation.

A State has not issued a final decision imposing an unconstitutionally discriminatory tax unless and until its administrative and judicial processes fail to cure the discrimination. Because Oklahoma granted a refund to petitioners for the tax which they alleged was discriminatory, their claim was never ripe as a matter of federal constitutional law.

A. Like Takings Claims, Discriminatory Tax Claims Are Not Ripe Until The State's Remedial Process Fails To Provide Constitutionally Adequate Redress For The Deprivation of Property

The Court has previously recognized as a general rule that a State can act through its legislature, executive or judiciary. *See Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 289-90 (1913) (citation omitted). The Court has nonetheless recognized that there are some constitutional rights which by their very nature are not violated unless and until the State has failed to provide a claimant with adequate relief. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985); *Parratt v. Taylor*, 451 U.S. 527 (1981). As a matter of federal constitutional law, a Section 1983 claim alleging the deprivation of such a right is not ripe unless the claimant has utilized the procedure provided under state law for obtaining meaningful relief and the State has denied such relief. *See Williamson County*, 473 U.S. at 194-195.

In *Williamson County*, the plaintiff brought a Section 1983 claim alleging that the application of a zoning ordinance to its property effected a taking of property in violation of the Just Compensation clause. *See* 473 U.S. at 182. The Court held that the plaintiff's claim was not ripe for two reasons. First, the plaintiff had not availed itself of the procedures available under state law for obtaining a variance which, if granted, could have provided relief from the application of the regulation. *See id.* at 186-94.

Second, and most significantly, the plaintiff had not sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Examining the constitutional right at issue, the Court noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* (citation omitted). As the Court further observed, "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.* at 194 n.13.

The Court further recognized that the absence of such a procedure, either before or contemporaneous with the deprivation of the property, did not alter the conclusion that the plaintiff had not stated a constitutional injury which was ripe for review. *Id.* at 194-95. As the Court noted, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court thus concluded that "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* Because the plaintiff had not availed itself of the State's judicial remedy for obtaining just compensation, the Court held that "its taking claim is premature." *Id.* at 197.

While *Williamson County* involved a claim for just compensation under the takings clause, its reasoning is applicable to claims of discriminatory taxation, whether those claims are raised under the dormant commerce and privileges and immunities clauses, the equal protection clause, or the intergovernmental tax immunity. Claims

of discriminatory taxation are functionally indistinguishable from takings claims in that both involve the deprivation of property by the State. *See McKesson*, 496 U.S. at 36.[19] And just as a takings claim does not arise if the State provides constitutionally adequate post-deprivation relief, *see Williamson County*, 473 U.S. at 194-95 & n.13, a discriminatory taxation claim should not be deemed to arise for constitutional purposes if the State provides a taxpayer with adequate post-deprivation relief. *Cf. McKesson*, 496 U.S. at 18. ("The State may, of course, choose to erase the property deprivation itself by providing petitioner with a full refund of its tax payments."); *see also Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced").

In cases of discriminatory taxation, the requirement of equality of treatment is, like the just compensation re-

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[19] In *McKesson*, the Court observed that "exaction of a tax constitutes a deprivation of property," 496 U.S. at 36, and that Due Process principles require a meaningful opportunity to "prevent[] any permanent unlawful deprivation of property." *Id.* at 40. The Court's takings clause jurisprudence provides another analogy relevant in determining the point at which a discriminatory tax claim becomes ripe for constitutional purposes. As the Court has observed, "the illegality . . . is confined to the failure to compensate . . . for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle [complainant] to be paid in advance of the taking." *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (footnote and citation omitted); *see also Williamson County*, 473 U.S. at 194-95. Takings claims thus have in common with tax claims the historic unavailability of equitable remedies where the State provides an adequate remedy at law. And like the Takings Clause's requirement of "just compensation," the standard of non-discrimination in state taxation is the measuring stick for determining whether the State has engaged in "any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40. A claim that a state tax discriminates in violation of the Constitution thus does not become ripe unless the State's remedial process fails to cure the unlawful deprivation of property.

quirement applicable in takings claims, the standard for assessing whether the State has provided constitutionally adequate relief for the deprivation of property. A State's failure to remedy unlawful discrimination in taxation is, like the failure to provide just compensation, a condition precedent to the accrual of a constitutional violation. Accordingly, the right to be free from state discrimination is not violated until the taxpayer pursues the remedies provided under state law and fails to obtain constitutionally adequate relief from the deprivation.

This conclusion is supported by the Court's recognition of the flexibility which a State retains in providing constitutionally adequate redress for a discriminatory tax. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 39-40 (1990). For example, a State may cure purported discrimination by refunding to those who paid the higher tax the difference between it and the lower tax. *Id.* at 40. The Court, however, has also made clear that a State may retroactively assess those benefitted by the lower tax rate at the higher tax rate even if some of those previously benefitted are no longer in business. *Id.* & n.23. A State may also cure discrimination by creating a scheme which combines "partial refund[s]" to those who paid the higher tax rate and "partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate . . . ." *Id.* at 41. As the Court recently explained, "a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510, 2520 (1993) (quoting *McKesson*, 496 U.S. at 40).

This flexibility derives from the Eleventh Amendment's traditional concern for the protection of state treasuries, *see Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394, 404-05 (1994); *Edelman v. Jordan*, 415 U.S. 651,

663 (1974), as well as the principles of comity and federalism embodied in the text and structure of the Constitution. It requires that claims of discriminatory state taxation, like the takings claim at issue in *Williamson County*, cannot be deemed to be ripe for Section 1983 purposes unless a taxpayer has pursued the State's administrative and judicial remedies for curing discrimination and been denied constitutionally adequate relief. A State's interest in preserving its fiscal integrity is indisputable. A State must accordingly be given the opportunity to exercise the flexibility granted by the Constitution to cure the unlawful deprivation before it can be said to have rendered a final decision which violates the Constitution. *Cf. Williamson County*, 473 U.S. at 195-97.[20]

B. Because Of The Unique Importance Of Tax Administration To State Sovereignty, A Discriminatory Tax Claim Is Not Ripe Until The State's Remedial Process Has Upheld The Tax

The conclusion that a discriminatory tax claim does not become ripe for federal purposes until the State's remedial process fails to provide constitutionally adequate relief for the property deprivation is supported not only by the nature of the right, but also by a recognition of the complexity of state tax administration. Like land use regulation, state tax assessment and administration is a highly specialized and complex function. As Justice

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[20] As the Court has recognized in the analogous context of procedural due process, there are some circumstances in which the Government's interest so outweighs the private interest that a State's "postdeprivation tort remedies are all the process that is due." *Zinermon v. Burch*, 494 U.S. 113, 128 (1990); *see also id.* at 127 (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976)). In such circumstances, no constitutional claim arises if the State provides an adequate remedial procedure. The State's provision of an adequate remedial procedure, just as its provision of just compensation in a takings claim, precludes the claim from becoming ripe. *See Williamson County*, 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Brennan explained, "[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (concurring in part and dissenting in part). The Court has thus expressly recognized that a taxpayer must pursue the administrative and judicial remedies provided by state law. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 397 (1990); *First Nat'l Bank v. Board of Commr's*, 264 U.S. 450, 454 (1924).

In *First Nat'l Bank*, the taxpayer alleged that a state property tax had been assessed in violation of the Equal Protection Clause of the Fourteenth Amendment. *See* 264 U.S. at 452-53. The taxpayer did not, however, avail itself of the procedure provided under state law for the equalization of the assessment and brought suit in federal district court, which dismissed the complaint. *See id.* at 454. This Court, after noting that the requirement that a taxpayer exhaust its administrative remedies was "already broadly recognized" and that "such remedies were, in fact, open and available under the [State's] statutes," affirmed, stating:

> Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth is one which we are not called upon to consider.

Id. at 455-56. *See also Gorham Mfg. Co. v. State Tax Comm'n*, 266 U.S. 265, 269 (1924) (holding that dormant commerce clause challenge "was properly dismissed . . . because of the failure of the [taxpayer] to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax"); *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 723-

24 (1923) ("parties who do not avail themselves of [an administrative remedy] cannot be heard to complain of such assessments as unconstitutional").

Moreover, state tax codes are frequently of extraordinary complexity and may well be ambiguous.[21] State courts share responsibility with state tax commissions for the administration and interpretation of state tax codes. *Cf. Burford v. Sun Oil Co.*, 319 U.S. 315, 326 (1943). The Court has also noted that "State courts are the principal expositors of state law. Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979); *cf. Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941). This is especially true in matters of state taxation. As Justice Brennan observed in *Perez*, "federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." 401 U.S. at 127 n.17 (citation omitted). Indeed, in many instances a claim may be resolved favorably to the taxpayer as a matter of either state statutory or constitutional law.

As the foregoing demonstrates, state tax administration is a function of governance of unique importance involving complex procedural and substantive law. Moreover, state action in this area implicates the States' fiscal integrity in a manner without parallel in other functions of governance. Likewise, the principles embodied in the Tenth and Eleventh Amendments as well as the structure of the Con-

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[21] In response to the increasing complexity of state tax codes, some States have created specialized courts whose jurisdiction is limited to tax disputes, *see, e.g.*, Or. Rev. Stat. § 305.405; N.J. Stat. Ann. § 54:51A-1, or assigned jurisdiction in such cases to a particular court. *See* Mo. Rev. Stat. § 143.841.5; N.Y. Tax Law art. 40, § 2016; Mich. Comp. Laws § 205.22; Tex. Tax Code Ann. § 112.001.

stitution—respect for state fiscal integrity and non-interference with critical state functions—must inform the inquiry into when state action creates a final decision violative of a taxpayer's rights. As the Court has recognized, these principles embody "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Fair Assessment*, 454 U.S. at 112 (quoting *Younger*, 401 U.S. at 44-45).

These considerations mandate the conclusion that in matters of taxation, a State's action is not final until its administrative and judicial processes have upheld a tax. Accordingly, a claim that a state tax discriminates in violation of the Constitution is not ripe for Section 1983 purposes until the State's court of last resort has rendered a final judgment upholding the tax.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted,

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March 24, 1995

APPENDIX

APPENDIX

Selected State Statutes Of Limitations In Taxpayer Suits And Personal Injury Actions

Compare Cal. Rev. & Tax Code § 6933 (requiring filing of suit within 90 days of denial of refund claim for sales and use tax); *with* Cal. Civ. Proc. Code § 340(3) (providing one year limitation for personal injury action);

Mich. Comp. Laws § 205.22(1) (requiring filing of suit in court of claims within 90 days of assessment or decision); *with* Mich. Comp. Laws § 600.5805(8) (providing three year limitation for personal injury action);

Minn. Stat. §289A.50(7) (requiring appeal to tax court be brought within 60 days or refund suit be brought within 18 months of tax commissioner's denial of refund claim); *with* Minn. Stat. § 541.07(1) (providing two year limitation in personal injury action);

Mo. Rev. Stat. § 143.841.3 (requiring filing of suit within thirty days of commissioner's denial of taxpayer's protest); *with* Mo. Rev. Stat. § 516.120(4) (providing five year limitation in personal injury action);

Mont. Code Ann. § 15-1-402 (requiring filing of suit within sixty days after final decision of state tax appeal board); *with* Mont. Code Ann. § 27-2-204(1) (providing three year limitation in personal injury action);

N.J. Stat. Ann. §54:51A-14 (requiring filing of complaint within 90 days of administrative decision); *with* N.J. Stat. Ann. § 2A:14-2 (providing two year limitation in personal injury action);

N.M. Stat. Ann. § 7-1-26(A) (requiring filing of refund suit within thirty days of administrative denial of claim or 120 days when claim is neither allowed nor denied); *with* N.M. Stat. Ann. § 37-1-8 (providing three year limitation in personal injury action);

Okla. Stat. tit. 68, § 226(b) (requiring filing of suit within one year of mailing of assessment); *with* Okla Stat. tit. 12, § 95 (providing two year limitation in personal injury action);

S.D. Codified Laws § 10-27-2 (requiring filing of suit within thirty days of payment under protest); *with* S.D. Codified Laws § 15-2-14(3) (providing three year limitation in personal injury action);

Tex. Tax Code Ann. § 112.052(b) (requiring filing of suit within 90 days after payment of tax under protest); *with* Tex. Civ. Prac. & Rem. Code § 16.003 (providing two year limitation in personal injury action).

No. 94-688

In The

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., *et al.*,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF BOYERTOWN AREA SCHOOL DISTRICT, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. State Courts Are Not Required To Entertain 42 U.S.C. §1983 Tax Challenges If Plain, Adequate And Complete Remedies Are Available Under State Law 8

A. Introduction 8

B. Section 1983 tax challenges represent a special category of cases where resort to state remedies can be mandated 9

C. Petitioners' Supremacy Clause argument lacks merit 16

II. Because The Supreme Court Of Oklahoma Properly Refused To Entertain Petitioners' Claim Under 42 U.S.C. §1983, Petitioners Have No Right To Attorneys' Fees Pursuant To 42 U.S.C. §1988(b) 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989) 2

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 22

Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66 (CA3 1991) 3

Boughton Trucking & Materials, Inc. v. County of Will, 229 Ill. App. 3d 576, 593 N.E.2d 1119 (1992) 18

California v. Grace Brethren Church, 457 U.S. 393 (1982) 18, 19, 23

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 22

County of Berks v. Murtagh, 114 S. Ct. 1397 (1994) 5

Dennis v. Higgins, 498 U.S. 439 (1991) 21

Dows v. Chicago, 78 U.S. (11 Wall.) 108 (1871) 11

Ex parte Young, 209 U.S. 123 (1908) 11

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) ..... *passim*

Felder v. Casey, 487 U.S. 131 (1988) 10

First Nat'l Bank of Greeley v. Board of County Comm'rs of Weld County, 264 U.S. 450 (1924) 14

Garrett v. Bamford, 582 F.2d 810 (CA3 1978) 3

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 13

Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) 2, 5

TABLE OF AUTHORITIES – Continued

Page

Howlett v. Rose, 496 U.S. 356 (1990) 10

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 13

McNeese v. Board of Educ., 373 U.S. 668 (1963) 10

Miller v. Bauer, 517 F.2d 27 (CA7 1975)..... 19

Murtagh v. County of Berks, 535 Pa. 50, 634 A.2d 179 (1993), *cert. denied*, 114 S. Ct. 1397 (1994) 3-5

North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6 (1986).....23, 24

Patsy v. Board of Regents, 457 U.S. 496 (1982) 10

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 21, 22

Perez v. Ledesma, 401 U.S. 82 (1971) 12

Raschke v. Blancher, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986) 18

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981) 17-19, 23

Sipe v. Amerada Hess Corp., 689 F.2d 396 (CA3 1982) 19

Spencer v. South Carolina Tax Comm'n, 471 U.S. 82 (1985) (per curiam) 6

Spencer v. South Carolina Tax Comm'n, 281 S.C. 492, 316 S.E.2d 386, *cert. granted*, 469 U.S. 879 (1984) 5

Stufflebaum v. Panethiere, 691 S.W.2d 271 (Mo. 1985)..... 21

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI, cl. 2 16

STATUTES

28 U.S.C. §1341 ..... 12, 13

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1988(b) 4, 7, 8, 19, 22-24

COURT RULES

Sup. Ct. R. 37.3 1

No. 94-688

In The

Supreme Court of the United States

October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., *et al.*,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Oklahoma

BRIEF OF BOYERTOWN AREA SCHOOL DISTRICT, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief is filed pursuant to Rule 37.3 with the written consent of counsel of record for all parties. *Amici curiae* Boyertown Area School District, *et al.*, support respondents and respectfully request affirmance of the Supreme Court of Oklahoma's judgment.

INTEREST OF *AMICI CURIAE*

Amici curiae Boyertown Area School District, Daniel Boone Area School District, Exeter Township School

District, Fleetwood Area School District, Governor Mifflin School District, Hamburg Area School District, Kutztown Area School District, Muhlenberg School District, City of Reading School District, Schuylkill Valley School District, Twin Valley School District, Wilson School District and Wyomissing Area School District are school districts located in Berks County, Pennsylvania that have been named as defendants in a suit known as *Murtagh v. County of Berks*. That suit is currently pending in Pennsylvania's state court system.

Plaintiffs in *Murtagh* have asserted a single claim for relief seeking monetary damages pursuant to 42 U.S.C. §1983. Plaintiffs allege that defendants used real estate tax assessment practices that, in violation of state law, resulted in new purchasers of real property paying a disproportionately high share of real estate taxes compared to the share paid by long-time owners of similar properties. Relying on this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989), plaintiffs in *Murtagh* contend that the real estate tax assessment practices about which they complain deprived them of their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

In 1992, the Commonwealth Court of Pennsylvania held that plaintiffs' 42 U.S.C. §1983 suit had to be dismissed because plain, adequate and complete administrative and judicial remedies existed under Pennsylvania law that permitted plaintiffs to raise their federal constitutional challenge to Berks County's system of property tax assessment. *See Greenwich Township v. Murtagh*, 144 Pa. Commw. 624, 632-37, 601 A.2d 1352, 1356-59 (1992).

The Commonwealth Court ruled:

> "We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment* [*in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981)], prohibiting or declining to exercise jurisdiction, have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes. Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted, state courts should also not interfere, because [their] enforcement of Section 1983 is no less intrusive or disruptive than if enforced by a federal court."

Id. at 632, 601 A.2d at 1356.

The Commonwealth Court in *Murtagh* also held, in accord with the ruling of the United States Court of Appeals for the Third Circuit, that Pennsylvania's state law administrative and judicial remedies for determining whether a tax runs afoul of federal law are plain, adequate and complete. *See id.* at 633-37, 601 A.2d at 1357-59; *see also Behe v. Chester County Bd. of Assessment Appeals*, 952 F.2d 66, 68 (CA3 1991); *Garrett v. Bamford*, 582 F.2d 810, 817 (CA3 1978).

On further appeal, the Supreme Court of Pennsylvania reversed. *See Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993), *cert. denied*, 114 S. Ct. 1397 (1994). Pennsylvania's highest court held that the Supremacy Clause of the United States Constitution requires a state

court to entertain a tax challenge brought pursuant to 42 U.S.C. §1983 regardless of whether administrative and judicial remedies available under state law would, if pursued, provide plain, adequate and complete relief. *See Murtagh*, 535 Pa. at 60-63, 634 A.2d at 184-85.

Accordingly, Pennsylvania taxpayers who wish to claim that state or local taxes are imposed in violation of federal law no longer are required to present their claims to the administrative and judicial tribunals that Pennsylvania's lawmakers have created to adjudicate such claims. These taxpayers are now able to proceed directly to state court to pursue 42 U.S.C. §1983 tax challenges without having to resort instead to the administrative and judicial remedies available under state law.

As a result of the Supreme Court of Pennsylvania's ruling in *Murtagh*, the Pennsylvania school districts who join in this brief are being denied the chance to cure, through existing state law remedies, the defects alleged in the *Murtagh* suit before being subjected to liability under 42 U.S.C. §1983.

These school districts are also now subject to being held liable for their adversaries' attorneys' fees should their adversaries prevail. *See* 42 U.S.C. §1988(b). This result is to the detriment of innocent Berks County, Pennsylvania taxpayers generally, who ultimately will bear the cost of such fees. More importantly, this result is also to the serious detriment of schoolchildren in Berks County, Pennsylvania, and in those many other Pennsylvania counties where copycat 42 U.S.C. §1983 tax challenges have arisen in the aftermath of the Pennsylvania Supreme Court's ruling in *Murtagh*, whose educational needs are

difficult enough to meet under the financial constraints that many school districts in Pennsylvania currently face. The educational needs of these children and of schoolchildren throughout the nation will become even more difficult to meet should this Court reverse the judgment of the Supreme Court of Oklahoma and require state courts to entertain 42 U.S.C. §1983 tax challenges without regard to the adequacy of existing state law remedies.

The ruling of the Supreme Court of Oklahoma below is in accord with the Commonwealth Court of Pennsylvania's ruling in *Greenwich Township v. Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992). And, as petitioners explained in their Petition for a Writ of Certiorari, *see* Pet. for Cert. 12-13, the Supreme Court of Pennsylvania's ruling in *Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993), which reversed the Commonwealth Court's dismissal of the *Murtagh* suit, conflicts directly with the Supreme Court of Oklahoma's ruling below.

Amici curiae Boyertown Area School District, *et al.*, having unsuccessfully sought last year to obtain this Court's review of the Supreme Court of Pennsylvania's ruling in *Murtagh*, *see County of Berks v. Murtagh*, 114 S. Ct. 1397 (1994) (denying certiorari), are pleased that this Court has agreed to decide the important question presented herein for review.[1] For the reasons that follow,

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[1] In 1984, this Court granted a petition for a writ of certiorari seeking review of a decision of the Supreme Court of South Carolina that is strikingly similar to the decision of the Supreme Court of Oklahoma now before this Court for review. *See Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386, *cert. granted*, 469 U.S. 879 (1984). The questions presented in

amici curiae Boyertown Area School District, *et al.*, respectfully request the affirmance of the judgment of the Supreme Court of Oklahoma.

SUMMARY OF THE ARGUMENT

The Supreme Court of Oklahoma correctly decided that federal law does not require a state court to entertain a 42 U.S.C. §1983 tax challenge where remedies exist under state law that are adequate to vindicate a taxpayer's claim that a state or local tax violates federal law.

Petitioners filed suit in Oklahoma state court seeking injunctive and declaratory relief barring further enforcement of a tax alleged to run afoul of the Commerce Clause of the United States Constitution. Petitioners also sought a refund of taxes already paid under the allegedly unconstitutional law.

The Oklahoma state courts refused to entertain petitioners' 42 U.S.C. §1983 claim because petitioners were able to obtain the relief they sought in state court by pursuing the remedies readily available under Oklahoma law. By exercising available state law remedies, petitioners obtained a declaration that the challenged tax violated the Commerce Clause, an injunction prohibiting

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Spencer were almost identical to the question presented herein. Only eight Justices were available to participate in considering *Spencer*, and this Court was evenly split over whether to affirm, resulting in the non-precedential affirmance of the Supreme Court of South Carolina's judgment. *See Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam) (Powell, J., not participating).

further enforcement of the tax and an order granting petitioners a refund of taxes paid in violation of federal law.

Having obtained vindication of their federal rights using the remedies that Oklahoma law provides, petitioners now argue that state courts have a duty to entertain tax challenges brought pursuant to 42 U.S.C. §1983 regardless of the adequacy of existing state law remedies. In its current posture, this case is simply a dispute over whether respondents should be held liable for petitioners' attorneys' fees under 42 U.S.C. §1988(b).

While this Court has ruled that the existence of adequate state law remedies is not generally a valid reason for a state court to refuse to hear a suit brought pursuant to 42 U.S.C. §1983, this Court has recognized an exception in the domain of state taxation, holding that the general rule of ready access to courts in 42 U.S.C. §1983 actions yields to the unique and significant state and local concerns implicated by challenges to a state or political subdivision's methods of raising revenue.

Where a §1983 damages action is brought in federal court challenging the constitutionality of a state or political subdivision's system of taxation, the federal court will dismiss the action if the court is satisfied that a plain, adequate and complete remedy exists under state law. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). For a state law remedy to be plain, adequate and complete, it merely must offer a plaintiff whose §1983 tax claim is barred from federal court the opportunity to have her federal claims heard administratively, with the right of appeal to the State's judicial

system and then to this Court. Where, as in Oklahoma and Pennsylvania, state law remedies are plain, adequate and complete, the unavailability of a 42 U.S.C. §1983 tax challenge does not undermine, or even threaten to undermine, the supremacy of federal law.

State courts do not violate the Supremacy Clause when they administer 42 U.S.C. §1983 in the same manner as federal courts. Because the existence of adequate state law remedies is sufficient to bar a 42 U.S.C. §1983 tax challenge in federal court, the existence of adequate state law remedies is also a sufficient reason why a state court may decide to refuse to entertain a 42 U.S.C. §1983 tax challenge filed in state court.

Given the undisputed existence of adequate state law remedies, the Supremacy Clause did not require Oklahoma's state courts to entertain petitioners' 42 U.S.C. §1983 tax challenge. Consequently, petitioners have no valid claim for attorneys' fees pursuant to 42 U.S.C. §1988(b) as petitioners have not prevailed in an action to enforce one of the civil rights laws listed in §1988(b). The judgment of the Supreme Court of Oklahoma should therefore be affirmed.

ARGUMENT

I. State Courts Are Not Required To Entertain 42 U.S.C. §1983 Tax Challenges If Plain, Adequate And Complete Remedies Are Available Under State Law

A. Introduction

This case arises at the crossroads where two significant federal policies collide. On the one hand is the

significant federal policy that plaintiffs who have been deprived of their federal constitutional rights under color of state law should generally have immediate and unrestricted access to federal and state courts to pursue actions under 42 U.S.C. §1983. On the other hand is the significant federal policy that courts should refrain from interfering with traditional state and local procedures for addressing challenges to the administration of taxation at the state and local levels.

This Court has ruled that 42 U.S.C. §1983 damages actions brought in federal court to challenge state or local taxation must yield to state remedies where those remedies are plain, adequate and complete. A vast number of state courts are in agreement, holding that a taxpayer cannot bring a state court §1983 action to challenge state or local taxation where the taxpayer seeks to circumvent existing state remedies that are plain, adequate and complete.

Understood in this context, it is clear that the Supreme Court of Oklahoma's ruling was faithful to federal law and in furtherance of this Court's directive that §1983 claims brought in state courts must be treated the same as §1983 claims brought in federal courts.

B. Section 1983 tax challenges represent a special category of cases where resort to state remedies can be mandated

The school districts joining in this brief recognize that this Court has held that a state judicial system generally may not place any outcome-determinative obstacle in the way of a §1983 claim that would not be encountered if

the §1983 claim were being asserted in federal court. *See Felder v. Casey*, 487 U.S. 131, 138 (1988). This Court has also held that the existence of adequate, alternate state law remedies is not generally a reason to bar a §1983 action from being brought in either federal or state court. *See Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963).

A recurring theme found in this Court's §1983 jurisprudence is that a §1983 claim should produce the same result whether brought in state or federal court. *See Howlett v. Rose*, 496 U.S. 356, 375-76 (1990); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Felder*, 487 U.S. at 138.

This Court ruled in *Howlett* and *Felder* that it would be anomalous for a §1983 claim to be barred in state court while the claim would be permitted to proceed in federal court. Thus, this Court held in *Howlett* and *Felder* that the state courts erred in barring the claims.

Likewise, in *Will* this Court noted that it would be anomalous for a §1983 claim to fail in federal court and yet be allowed to proceed in state court. Thus, in *Will* this Court held that States, which cannot be sued under §1983 in federal court because of the Eleventh Amendment, cannot be sued under §1983 in state court because they are not "persons" as that term is used in the statute.

The principle that must be taken from *Howlett*, *Will* and *Felder* is that state courts must treat §1983 claims generally the same as federal courts, no better and no worse. It is therefore necessary to examine how federal courts resolve §1983 claims challenging state and local taxation.

The answer to that enquiry is found in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). In *McNary*, this Court was asked to decide whether a federal district court had to entertain a §1983 damages action challenging the allegedly unconstitutional administration of St. Louis County, Missouri's real property tax assessment procedures. The taxpayers in *McNary* claimed that the challenged tax scheme deprived them of equal protection and due process of law. *See* 454 U.S. at 106.

This Court began its opinion in *McNary* by quoting from the unanimous opinion of Justice Field in *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). *See McNary*, 454 U.S. at 102. In *Dows*, a case decided only months before Congress enacted the statute now codified at 42 U.S.C. §1983, Justice Field wrote:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public."

Dows, 78 U.S. (11 Wall.) at 110.

The Court's sentiments in *Dows* proved prescient. For example, after Congress enacted §1983 and this Court held that federal courts could enter injunctions prohibiting state officers from enforcing unconstitutional state laws, *see Ex parte Young*, 209 U.S. 123 (1908), Congress took action in 1937 to protect the integrity of state and

local tax systems from the devastating effects of such injunctions by enacting the Tax Injunction Act, 28 U.S.C. §1341. The Act provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. §1341. Thus, while federal courts could enjoin state officers from enforcing most unconstitutional state laws, Congress prohibited federal courts from enjoining state officers from enforcing unconstitutional state tax laws where state law offered a plain, speedy and efficient remedy.

This Court has continued to recognize the unique state and local concerns implicated in federal challenges to state and local taxation in more recent times. In 1971, those concerns were eloquently voiced by Justice Brennan. In his separate opinion in *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part), Justice Brennan wrote:

> "The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state

> law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts."

One year later, this Court returned to the issue in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972). There, in distinguishing several cases cited for the proposition that federal courts only had jurisdiction over §1983 cases that implicated "personal" rights, rather than "property" rights, the Court wrote:

> "All of these cases involved constitutional challenges to the collection of state taxes. *Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations . . . .* "

405 U.S. at 542 n.6 (emphasis added).

The tension between §1983 and Congress's long-standing policy against federal interference with the enforcement of state and local tax laws came to a head in *McNary*. When *McNary* came before this Court in 1981, it had long been clear that federal courts would not enjoin state tax laws, or even declare them unconstitutional, if a "plain, speedy and efficient" remedy was available under state law. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943); 28 U.S.C. §1341. However, until *McNary* the Court had never examined whether federal courts could hear §1983 actions seeking damages on account of allegedly unconstitutional state or local taxes.

In *McNary*, the Court held that a §1983 suit seeking damages for the allegedly unconstitutional administration of St. Louis County's real property tax assessment system could not be brought in federal court. The Court wrote:

> "despite the ready access to federal courts provided by *Monroe*[*v. Pape*, 365 U.S. 167 (1961),] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting §1983 actions against the validity of state tax systems in federal courts. *Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete,* and may ultimately seek review of the state decisions in this Court."

McNary, 454 U.S. at 116 (emphasis added; footnote omitted).[2] The Court in *McNary* thus concluded that deference should be given to state tax procedures free from the federal intrusion that a damages claim under 42 U.S.C. §1983 was likely to cause. *See also First Nat'l Bank of Greeley v. Board of County Comm'rs of Weld County*, 264 U.S. 450 (1924) (suit alleging that tax was collected in violation of due process and equal protection clauses of Fourteenth Amendment held barred by taxpayer's failure to exhaust available state remedies).

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[2] In the omitted footnote, the Court wrote that it "discern[ed] no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning" of the Tax Injunction Act. *McNary*, 454 U.S. at 116 n.8.

The Court made clear that its primary purpose in *McNary* was to avoid interfering with state tax administration. The Court thus preserved the ability of States to apply their procedures and remedies in tax matters. As the Court explained:

> "the intrusiveness of such §1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, 365 U.S. 167 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety."

McNary, 454 U.S. at 113-14.

It certainly is no less disruptive of a state or local government's internal economy and administrative and adjudicative procedures for a state court to entertain a §1983 tax challenge than it would be for a federal court to do so. Regardless of which judicial system interferes with the state or local government's fiscal operations, the affected state, county, municipal and/or school district tax officials would be improperly denied the chance to cure any alleged defects before being subjected to a §1983 action. Thus, the concerns that provided the basis for this Court's decision in *McNary* are equally applicable to 42 U.S.C. §1983 tax challenges brought in state court.

This Court has held that §1983 challenges to a state or political subdivision's scheme of tax administration represent a special category of cases where a court can decline to entertain a 42 U.S.C. §1983 suit in favor of existing, adequate state law remedies. The Supreme Court of Oklahoma thus did not violate federal law when it declined to entertain petitioners' 42 U.S.C. §1983 tax

challenge for the very reasons approved by this Court in *McNary*.

C. Petitioners' Supremacy Clause argument lacks merit

Petitioners argue at length that the Supreme Court of Oklahoma's decision violates the Supremacy Clause, which provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

To the contrary, the Oklahoma Supreme Court's decision does not conflict with the Supremacy Clause, because that court's ruling gives effect to Congress's longstanding policy of deference toward the traditional state and local procedures for resolving challenges to state and local taxation.

At bottom, petitioners assert that the Supremacy Clause requires state courts to entertain §1983 actions against state and local taxing authorities without regard to the adequacy of existing state law remedies. If petitioners are correct, we are at a loss to understand why this Court ever undertook to determine whether a state's existing remedies qualified as "plain, speedy and efficient" or "plain, adequate and complete" in deciding whether to entertain a 42 U.S.C. §1983 tax challenge filed in federal court, because a plaintiff who sought to bring such a suit in federal court, but was thwarted by the Tax Injunction Act or this Court's ruling in *McNary*, would always be free instead to refile her §1983 suit in state court.

Petitioners' argument is indeed inconsistent with the manner in which this Court has disposed of 42 U.S.C. §1983 tax challenges improperly brought in federal court. In *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 510 (1981), for example, the Court confronted a §1983 action in which plaintiff claimed that the property tax assessment policy of Cook County, Illinois required her to pay three and one-half times the lawful amount of tax, in violation of her federal rights to equal protection and due process. The district court dismissed her suit, finding it barred under the Tax Injunction Act. The United States Court of Appeals for the Seventh Circuit reversed, holding that Illinois law did not provide plaintiff with a plain, speedy and efficient remedy.

This Court disagreed and ruled that Illinois law did provide plaintiff with a plain, speedy and efficient remedy, even though the state law remedy was less attractive than the remedy presumed available under 42 U.S.C. §1983. *See* 450 U.S. at 505, 515, 523-25. The state law remedy at issue in *Rosewell* did not guarantee plaintiff interest on her alleged overpayments, while the Court assumed without deciding that plaintiff would be entitled to such interest under §1983. *See* 450 U.S. at 505, 515, 523-25.

This Court held in *Rosewell* that for a state remedy to qualify as plain, speedy and efficient the remedy merely must meet "certain minimal *procedural* criteria." *Id.* at 512. The Court also explained that a state remedy is plain, speedy and efficient if it "provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax"

followed by the opportunity to seek review in this Court. *Id.* at 514 (internal quotations omitted).[3]

Similarly, in *California v. Grace Brethren Church*, 457 U.S. 393, 414 (1982), this Court held California's remedy to be plain, speedy and efficient where the taxpayer had available to it administrative remedies, followed by judicial remedies where the taxpayer could raise "all arguments against the validity of the tax." Then, the taxpayer could "ultimately seek review in this Court." *Id.*

In *Grace Brethren Church*, this Court also noted that in 1937, when Congress enacted the Tax Injunction Act, Congress was well aware that refund procedures were in many states the *sole remedy* to recover unlawfully collected taxes. *See id.* at 416. It thus seems clear that Congress, when it enacted the Tax Injunction Act, did not intend by its action to require state courts to alter their existing procedures by forcing state courts to entertain injunctive challenges to state or local taxation brought pursuant to 42 U.S.C. §1983. *E.g., Grace Brethren Church*, 457 U.S. at 416-17 (declining to create exception to Tax Injunction Act for the benefit of taxpayers raising First

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[3] In *Rosewell*, the Court noted that the Seventh Circuit below had concluded that Illinois state courts would entertain 42 U.S.C. §1983 tax challenges, but this Court wrote that it did "not reach this issue." 450 U.S. at 511 n.14. More recently, however, Illinois state courts have ruled that they will not hear §1983 tax challenges where plaintiffs have failed to exhaust the administrative remedies available under state law. *See Boughton Trucking & Materials, Inc. v. County of Will*, 229 Ill. App. 3d 576, 593 N.E.2d 1119 (1992); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986).

Amendment claims where remedy available to taxpayers under state law was limited to a refund action).

To accept petitioners' argument is to conclude that *Rosewell* and *Grace Brethren Church* were wrongly decided. If state courts were required under the Supremacy Clause to entertain independent §1983 actions even where plain, adequate and complete state law remedies exist, one wonders why this Court determined in those two cases, and why lower federal courts ever since have continued to determine, whether existing state remedies were sufficient to compensate for the unavailability of a federal cause of action under §1983.[4]

The evil of federal interference in matters involving state and local taxation, which both Congress and this Court have abhorred and forbidden, *see Grace Brethren Church*, 457 U.S. at 419 (the Court notes "Congress' intent and our longstanding policy 'to limit drastically' federal interference in the administration of state taxes when a

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[4] While petitioners make much of the fact that reinstatement of their §1983 claim may permit them to recover attorneys' fees under 42 U.S.C. §1988(b), it is understood that for a state remedy to be plain, adequate and complete it "need not be coextensive with that available in the federal courts . . . . " *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 407 (CA3 1982); *see also Miller v. Bauer*, 517 F.2d 27, 32 (CA7 1975) (remedy under state law need not be best remedy available or even equal to remedy available in federal court). If petitioners cannot recover their attorneys' fees here, they are no worse off than the plaintiff in *Rosewell* who, upon being remitted to state court to pursue her state law remedies, presumably lost the right to recover both her attorneys' fees *and* interest on any overpayments she may have made as the result of the unconstitutional overassessments about which she complained.

'plain, speedy and efficient' state remedy is available"), is not dispelled simply because the interference results from a §1983 action brought in state court. Where a state court concludes that it has been commanded by Congress and the Supremacy Clause to disregard state tax assessment remedies in favor of a federal remedy shaped by the federal courts, the interference remains federal in nature. To suppose that the intrusion would be any less would be to presume that state courts will refuse to provide the same relief normally available to §1983 litigants in federal court. The end result of a 42 U.S.C. §1983 tax challenge in state court is no less offensive to principles of comity and federalism than were the federal court damages actions that this Court barred in *McNary*.

This Court's statement in *McNary* that those who try to challenge state or local taxation by filing a 42 U.S.C. §1983 action in federal court instead "must seek protection of their federal rights by *state remedies*, provided of course that those remedies are plain, adequate and complete," 454 U.S. at 116 (emphasis added), is difficult to understand as meaning that state courts must entertain 42 U.S.C. §1983 tax challenges. Indeed, the result that petitioners seek here would undermine a crucial premise of this Court's holding in *McNary* – that a 42 U.S.C. §1983 tax challenge can be maintained in federal court where state remedies are *not* plain, adequate and complete. If state courts must entertain 42 U.S.C. §1983 tax challenges, the remedy available in state court would inevitably qualify as plain, adequate and complete.[5]

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[5] It is true that this Court in *McNary*, in the course of discussing the remedies available in the courts of Missouri,

In sum, it is fully consistent with the Supremacy Clause for a state court to refuse adjudication of a §1983 challenge to state or local taxation where existing state law remedies are plain, adequate and complete. This Court should reject petitioners' suggestion to the contrary.[6]

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referred to the fact that Missouri state courts generally entertained 42 U.S.C. §1983 actions, citing two Missouri Supreme Court opinions issued in §1983 actions, neither of which involved challenges to state or local taxation. *See McNary*, 454 U.S. at 116-17. There was no indication in *McNary*, however, that this Court believed the Supremacy Clause compelled state courts to hear 42 U.S.C. §1983 tax challenges regardless of the adequacy of state law remedies. Less than four years later, this Court's prediction in *McNary* of the Missouri state courts' willingness to entertain 42 U.S.C. §1983 tax challenges proved wrong. *See Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (holding that because a plain, adequate and complete remedy existed under state law which taxpayers could use to challenge the federal constitutionality of real estate taxation, Missouri state courts need not entertain a 42 U.S.C. §1983 suit challenging that taxation). Nevertheless, nowhere in the aftermath of *Stufflebaum* does it appear to have been understood that the inability of a taxpayer to bring a 42 U.S.C. §1983 tax challenge in state court has rendered Missouri's state law remedies less than plain, adequate and complete.

[6] Petitioners' reliance upon this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), as foreshadowing the outcome of this case is misplaced, because *Dennis* sheds absolutely no light on the question now before this Court. In *Dennis*, the Court merely decided that 42 U.S.C. §1983 provides a cause of action for violations of the Commerce Clause. The Court did not decide whether state courts could require that existing adequate state law remedies be pursued instead of entertaining tax challenges brought pursuant to §1983.

Petitioners also quote a sentence from *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 (1984), where this Court

II. Because The Supreme Court Of Oklahoma Properly Refused To Entertain Petitioners' Claim Under 42 U.S.C. §1983, Petitioners Have No Right To Attorneys' Fees Pursuant To 42 U.S.C. §1988(b)

Petitioners argue that the Supreme Court of Oklahoma's refusal to entertain their 42 U.S.C. §1983 claim constituted the denial of a right under federal law that Congress intended to make available to petitioners. Petitioners' argument that 42 U.S.C. §1983 confers rights is contrary to this Court's ruling in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

In *Chapman*, this Court held that 42 U.S.C. §1983 does not confer substantive rights but merely provides a remedy to facilitate the enforcement of federal rights found in other provisions of federal law that do confer substantive rights. *See* 441 U.S. at 617-18. Thus, by denying petitioners the ability to bring their 42 U.S.C. §1983 claim in state court, the Supreme Court of Oklahoma has not deprived petitioners of any federal right. Instead, the Oklahoma Supreme Court has, at most, only deprived

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wrote in dicta that "[c]hallenges to the validity of state tax systems under 42 U.S.C. §1983 also must be brought in state court." *Pennhurst*, an Eleventh Amendment decision, involved whether a federal court could order state officials to conform their conduct to state law. *Pennhurst* did not purport to decide whether state courts must entertain §1983 challenges against state or local taxing authorities where plain, adequate and complete state law remedies exist. Petitioners' reliance on the dicta in *Pennhurst* as having decided the question now before the Court is further undermined by this Court's later statement in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), that "[w]hether state courts must assume jurisdiction over [42 U.S.C. §1983 tax challenges] is not entirely clear."

petitioners of a federal remedy in accord with this Court's decisions holding that a federal remedy under 42 U.S.C. §1983 must give way to the important state and local interests implicated in the realm of taxation.

Despite petitioners' repeated suggestions to the contrary, based upon their inaccurate portrayal of 42 U.S.C. §1983 as a "right" rather than a "remedy," the Oklahoma state courts have permitted petitioners to achieve vindication of their rights under federal law and, more specifically, under the Commerce Clause. What the Supreme Court of Oklahoma has not permitted petitioners to do is employ a federal remedy, 42 U.S.C. §1983, as the means for vindicating those federal rights. Instead, petitioners have vindicated their federal rights by using state law remedies, just as this Court envisioned in *McNary*, *Rosewell* and *Grace Brethren Church*.

Petitioners conclude their opening brief on the merits by arguing that the Supreme Court of Oklahoma's ruling negates the basic purpose of 42 U.S.C. §1988(b), which petitioners claim is to make attorneys' fees available to "all persons who are required to resort to legal action to vindicate their federal rights . . . . " Brief of Petitioners 32.

In making that argument, petitioners overlook this Court's ruling in *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986). There, this Court ruled that "[u]nder the plain language and legislative history of §1988, however, only a court in an action to enforce one of the civil rights laws listed in §1988 may award attorney's fees." *Id.* at 15.

Petitioners would be entitled to recover their attorneys' fees pursuant to 42 U.S.C. §1988(b) only if the

Supreme Court of Oklahoma erred in dismissing petitioners' claim for relief under 42 U.S.C. §1983. Because, for reasons already explained, the Supreme Court of Oklahoma did not err in dismissing petitioners' claim for relief under 42 U.S.C. §1983, petitioners have no entitlement to recover their attorneys' fees pursuant to 42 U.S.C. §1988(b). *See Crest St. Community Council*, 479 U.S. at 15.

CONCLUSION

The judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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No. 94-688.

IN THE
Supreme Court of the United States

October Term, 1994

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,
PETITIONERS,

v.

OKLAHOMA TAX COMMISSION, ET AL.,
RESPONDENTS.

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION, INC. IN SUPPORT OF PETITIONER PRIVATE TRUCK COUNCIL OF AMERICA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

RULE 37.3 DISCLOSURE 1

STATEMENT OF INTEREST 2

DECISION BELOW 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. The Tax Injunction Act Does Not Preempt § 1983 Claims In Cases Involving State Taxation 6

II. The Right To Recover Reasonable Attorneys' Fees Would Enable DMA's Members To Assert Their Constitutional Rights 8

A. Without § 1988 Fee Awards, Small Retailers Would Be Unable To Enjoy Fully Their Constitutional Rights Under the Commerce Clause 9

B. Requiring State Courts To Hear § 1983 Actions Would Also Deter Individual States From Wrongfully Interfering With The National Marketplace Created By The Commerce Clause 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Barringer v. Griffes, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 879 (1994) 7

California v. Grace Brethren Church, 457 U.S. 393 (1982) 6n

Carey v. Piphus, 435 U.S. 247 (1978) 9n

TABLE OF AUTHORITIES (*cont'd*)

Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 8

Claflin v. Houseman, 93 U.S. 130 (1876) 7

Dennis v. Higgins, 498 U.S. 439 (1991) 5, 7, 8, 11

Direct Marketing Association, Inc. v. Bennett, 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) 4n, 7

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 11n

Howlett v. Rose, 496 U.S. 356 (1990) 5

L.L. Bean, Inc. v. Pledger, No. 91-2479, slip op. (Ch. December 8, 1994) 12n

Maine v. Thiboutot, 448 U.S. 1 (1980) 8, 11

National Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967) 2, 3

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 8

Pechiney Corp. v. Crystal, 43 Conn. Supp. 91, 643 A.2d 319 (1994) 7n, 11, 11n

Private Truck Council of America, Inc. v. Oklahoma Tax Commission, 879 P.2d 137 (Ok. 1994) 4, 13

Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) 2, 3, 9, 10n, 11n

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 4n, 5, 6, 10

Testa v. Katt, 330 U.S. 386 (1947) 5

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 6n

Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) 7

STATUTES

UNITED STATES CODE

28 U.S.C. § 1341	4, 7n
42 U.S.C. § 1983	*passim*
42 U.S.C. § 1988	*passim*

MISCELLANEOUS

S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908 — 8n, 9

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v.

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BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION, INC. IN SUPPORT OF PETITIONER PRIVATE TRUCK COUNCIL OF AMERICA, INC.

RULE 37.3 DISCLOSURE

The Direct Marketing Association, Inc. ("DMA") files this brief as *amicus curiae* in support of the position of Petitioner Private Truck Council of America, Inc. (the "Truck Council"). DMA agrees with the Truck Council that the Oklahoma Supreme Court erred by holding that Oklahoma courts cannot hear 42 U.S.C. § 1983 ("§ 1983") claims involving state taxation. This brief is accompanied by the written consent of the parties.

STATEMENT OF INTEREST

DMA, a not-for-profit corporation, is the oldest and largest trade association representing individuals and companies that are engaged in mail order marketing and advertising. DMA has over 3200 members located in all 50 states and 40 foreign countries. Significantly, the majority of DMA's members are small businesses. Approximately 85% have annual sales of $10 million or less. Approximately 20% employ fewer than 4 people, including "mom and pop" operations that continue to prepare their catalogs on kitchen tabletops and in home offices.

Since its inception in the late 19th century, mail order marketing has attracted start-up companies and local retailers who have recognized opportunities for expansion into a national marketplace. Catalog retailers have been able to sell to this large market despite having limited resources, few employees and locations remote from urban centers. If these entrepreneurs and small businesses are to have continued access to a national marketplace unimpeded by state and local trade barriers, they must have a realistic opportunity to defend themselves against unconstitutional tax assessments without exhausting their financial resources in the process.

The need to clarify the right of business litigants to recover legal fees under 42 U.S.C. § 1988 ("§ 1988") has grown increasingly acute over the past 10 years. During that time, state revenue departments have waged aggressive campaigns to compel mail order companies to collect and remit state and local use taxes. In their zeal, many state tax administrators have violated the Commerce Clause rights of nonresident retailers by disregarding the "substantial nexus" rule articulated by the United States Supreme Court. *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992); *National Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753 (1967).

Instead of respecting the clear standards established in *Quill* and *National Bellas Hess*, some state tax administrators have pursued the cynical enforcement strategy of targeting small out-of-state mail order companies for use tax audits and assessments. They have assumed that small retailers located in distant states lack the resources to battle their way through arcane and protracted administrative proceedings and court hearings to protect their constitutional rights. If DMA's members are denied the opportunity to recover reasonable attorneys' fees under § 1988, these intentional — but unsupportable — tax collection efforts will increase. The protections of the Commerce Clause will effectively be placed beyond the reach of those they were intended to safeguard. Since the expense of prosecuting in a foreign state a constitutional challenge to a state tax assessment would present a forbidding, if not insurmountable, barrier to most of DMA's members. It is this very circumstance which § 1988 was designed to prevent.

The gravity of the situation is underscored by the fact that there are at least 14 states with sales and use tax statutes which contain provisions requiring use tax collection under circumstances which are in clear conflict with the Commerce Clause limitations set forth in *Quill* and *National Bellas Hess*. *See*, *e.g.*, GA § 48-8-2(3)(H); IN § 6-2.5-8-10; IA § 422.33(12); KS § 79-3702(h)(2); KY § 139.340(2)(c); MN § 297A.21(4). State tax administrators, auditors and hearing officers often take the position, even after *Quill*, that they are obliged to enforce these statutes until they are repealed by their state's legislature or invalidated by a court of law. As a result, DMA's members face the specter of costly and time-consuming state-by-state battles to defend tax assessments based on unconstitutional tax codes.

DECISION BELOW

This case involves the refusal of a state court to hear and resolve a well-pleaded claim under § 1983, despite its having both the parties and the underlying constitutional controversy properly before it. This Court has already reversed a prior decision of the Oklahoma Supreme Court in this same case which held that a § 1983 claim was not available for Commerce Clause violations.

In erecting yet another barrier to relief under § 1983, the court below reasoned that: (1) in most instances, the Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from hearing cases involving state taxes[1]; (2) as a result, federal courts are usually precluded from adjudicating § 1983 claims involving state taxes, including requests for attorneys' fees under § 1988[2]; and (3) therefore, since federal courts usually will not entertain § 1983 actions in state tax cases, state courts — for reasons of "comity" and "federalism," according to the Oklahoma Supreme Court — must refuse to hear them as well. *Private Truck Council of America, Inc.* v. *Oklahoma Tax Commission*, 879 P.2d 137, 139-141 (Ok. 1994).

[1] Under the Tax Injunction Act, federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." This statute was enacted to prevent federal courts from interfering with the orderly disposition of tax cases by state administrative agencies and courts *provided that* state procedures were sufficiently plain, speedy and efficient. *See, e.g., Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981).

[2] It is clear that § 1983 claims involving state taxation can proceed in federal court in those cases where the bar of the Tax Injunction Act can be avoided. *See, e.g., Direct Marketing Association, Inc.* v. *Bennett*, 916 F.2d. 1451 (9th Cir. 1990), *cert. denied* 500 U.S. 905 (1991) (where uncertainty existed as to whether plaintiff could assert its constitutional claims in state court, a federal district court should hear and resolve the case, including claims arising under § 1983).

SUMMARY OF ARGUMENT

By confusing the jurisdiction-shifting provisions of the Tax Injunction Act with an absolute bar on the prosecution of 42 U.S.C. § 1983 claims in state tax cases, the Oklahoma Supreme Court held that state courts are free to ignore properly pleaded § 1983 claims. This Court has long condemned such discrimination against federal claims as violative of the Supremacy Clause. *See Howlett* v. *Rose*, 496 U.S. 356, 367 (1990); *Testa* v. *Katt*, 330 U.S. 386 (1947). Moreover, the fundamental reasoning of the Oklahoma Supreme Court — that it wished to create uniformity between the remedies available in state and federal courts — is belied by the fact that in those instances where federal courts hear state tax cases (*i.e.*, where the Tax Injunction Act does not apply), they readily award relief under §§ 1983 and 1988.

Neither the Tax Injunction Act nor any other federal law calls for the absolute preemption of § 1983 claims in state tax cases. *See Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981) (the "Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts"). As a result, only state court *acceptance* of jurisdiction over § 1983 claims — not the denial of it — furthers the broad mandate of § 1983, *see Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) ("broad construction is compelled by the statutory language"), as well as the Tax Injunction Act's goal of limiting federal court interference in state tax matters.

Finally, in adopting §§ 1983 and 1988, Congress recognized that parties whose constitutional rights are violated are entitled to recover reasonable attorneys' fees. The constitutional rights of many of DMA's members, however, would be illusory if the Oklahoma Supreme Court's decision were affirmed. More-

over, without the potential for such fee awards, there is no deterrent to the actions of overzealous state revenue departments that are willing to foist unconstitutional tax burdens on nonresident companies.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT PREEMPT § 1983 CLAIMS IN CASES INVOLVING STATE TAXATION.

The Oklahoma Supreme Court misapprehended both the purpose and operation of the Tax Injunction Act (the "Act"). The Act's limited purpose is to shift litigation of state tax controversies from the federal courts to state courts. In operation it protects the states from harm they might suffer due to federal court interference in orderly state procedures governing challenges to state taxation. *See, e.g., Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 526 (1981).

As the Court made clear in *Rosewell*, the Act rests upon a presumption that plaintiffs would be able to assert all federal rights in state court as long as *procedural* criteria are met. 450 U.S. at 519 n.15 (federal courts are divested of jurisdiction under the Act where "a state-court remedy meets certain minimal procedural criteria").[3] No suggestion appears either in the language or legislative history of the Act that it was intended as a limit on the availability of federal causes of action in state

[3] "What little can be gleaned from the legislative history of the Act on the phrase 'plain, speedy and efficient remedy' lends further support to a procedural interpretation." 450 U.S. at 513. *See also California* v. *Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982) (the primary purpose of the Act was to prevent taxpayers from "avoid[ing] state administrative and judicial proceedings"); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (the "basic inquiry" is whether the state provides "a 'plain, speedy and efficient' way for [the taxpayer] to press its constitutional claims").

tax cases — particularly with respect to § 1983, which was intended by Congress to have wide-sweeping application. *See Dennis* v. *Higgins*, *supra*.

Indeed, in those rare cases where the Act does not bar federal jurisdiction over a state tax claim, federal courts have freely adjudicated § 1983 claims and awarded attorneys' fees to prevailing taxpayers. *See*, *e.g.*, *Barringer* v. *Griffes*, 964 F.2d 1278 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 879 (1994); *Direct Marketing Association, Inc.* v. *Bennett*, 916 F.2d 1451 (1990), *cert. denied*, 500 U.S. 503 (1991). As a consequence, it is the Oklahoma court's refusal to hear a federal cause of action that undermines federalism, *see Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876) (federal "legal and equitable rights . . . may be enforced in any court"), since, by so doing, it declined to respect the superior source and authority of federal law.[4]

The flaw in the lower court's effort to use the Act as a means of ridding itself of jurisdiction over § 1983 claims is further underscored by the well-settled rule that the concurrent jurisdiction of the state courts to hear federal claims can only be defeated by an Act of Congress which "affirmatively divests" the state courts of jurisdiction. *See*, *e.g.*, *Yellow Freight System, Inc.* v. *Donnelly*, 494 U.S. 820, 823 (1990). The Act in no way qualifies as such an affirmative congressional limitation on state court jurisdiction over § 1983 claims.

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[4] Likewise, principles of comity do not support the lower court's decision. *See Pechiney Corp.* v. *Crystal*, 43 Conn. Supp. 91, 643 A.2d 319 (1994) ("These concerns of comity, however, in no way foreclose state courts from hearing § 1983 actions in conjunction with state tax appeals. Neither the letter nor the spirit of § 1341 are violated by the existence of such state court jurisdiction. This jurisdiction, in fact, fully implements the policies of both § 1983 (*i.e.*, the vindication of civil rights) and § 1341 (*i.e.*, the noninterference of federal courts in state tax matters) in a way that federal jurisdiction does not.")

II. The Right To Recover Reasonable Attorneys' Fees Would Enable DMA'S Members To Assert Their Constitutional Rights.

Courts have accorded deep respect to the right to seek attorneys' fees under § 1988 for violations of constitutional rights. As this Court has observed, the reasons for such respect are twofold:

> First, . . . the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

Christianburg Garment Co. v. *EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)) (citation omitted).

Awarding fees to prevailing parties in § 1983 cases serves two important purposes, both of which would be furthered by reversing the court below. First, it allows all persons, regardless of their financial wherewithal, to seek vindication of their constitutional rights. *Dennis* v. *Higgins*, 498 U.S. 439 (1991) (an "award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced").[5] Second, it deters future constitutional violations. *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1, 11 (1980) (fee awards are "an integral part of the remedies necessary to obtain

[5] *See also* S. Rep. No. 94-1011 at 2 (1976), 1976 U.S. Code Cong. & Admin. News 5908, 5910 ("if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court").

compliance with § 1983")(quoting S. Rep. 94-1011 at 5 (1976), U.S. Code Cong. & Admin. News 1976 at 5913).[6]

A. Without § 1988 Fee Awards, Small Retailers Would Be Unable To Enjoy Fully Their Constitutional Rights Under the Commerce Clause.

In *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992), this Court held that the Commerce Clause protects out-of-state retailers with no physical presence in the taxing state from being forced to collect and remit use taxes for those states. Nevertheless, despite this clear and recent precedent, DMA's members continue to be the targets of aggressive campaigns by state tax officials to compel them to collect and remit use taxes in states where they lack such nexus. These demands are often based upon far-fetched theories of nexus which have no basis in established case law and are directly at odds with *Quill*.

State revenue departments have taken special aim at smaller companies on the apparent belief that such companies will be unable to defend themselves in administrative proceedings and court battles far from their home states. This tax collection strategy often bears results for a number of reasons.

First, in most states, a direct marketer subjected to an assessment must wend its way through several levels of administrative hearings before being able to proceed to a hearing in state court. Second, state administrative boards and hearing officers usually refuse even to consider constitutional objections, claiming that state courts alone, and not administrative agencies, are entitled to rule on the constitutionality of either state statutes or the actions of state officials. As a consequence, it can be

[6] *See also Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978) ("the potential liability of § 1983 defendants for attorney's fees . . . provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore due process rights").

years before a substantial constitutional defense to a tax assessment is given any consideration. Third, many state tax codes require that contested tax assessments must be paid prior to any judicial review. *See, e.g., Rosewell, supra*, 450 U.S. at 523. It is not financially feasible for a small direct marketer both to pay the disputed assessment — which can reflect several years of uncollected taxes which are allegedly due and owing, plus interest and penalties[7] — and wage a protracted battle far from its home state for review of the assessment through complex administrative and judicial machinery.

Moreover, it is not uncommon for other state revenue departments to pursue the same theory of tax liability once a fellow state has issued an assessment. Consequently, a small retailer may have to battle several states at the same time over the same constitutional issue. Absent the ability to recover attorneys' fees, the expense of waging multiple constitutional challenges to state tax assessments presents an almost insurmountable barrier for most direct marketers. The reality of the situation often forces these companies to negotiate a compromise settlement of back tax liability and to commit themselves to a costly future of use tax collection. Constitutional rights thereby become a luxury that they cannot afford.

The dilemma faced by DMA's members underscores the substantial federal interest in equipping interstate businesses with an effective means of defending themselves against the purely local aims of aggressive state revenue departments. This Court's Commerce Clause standards would be rendered virtually meaningless if state tax administrators were unconstrained from pressuring small companies into paying disputed tax assessments (or into agreeing to assume the heavy burden of

[7] In cases of an alleged failure to collect and remit use taxes, the amount of an assessment can be staggering since, in most states, no statute of limitations applies. Use tax assessments, therefore, frequently cover periods of six years or more. *See Quill*, 112 S.Ct. at 1916 n.10.

collecting state use taxes voluntarily) under the threat of costly and extended litigation.[8]

The need for reasonable fee awards in the face of unconstitutional tax collection efforts is most acute for small to medium-sized companies. The survival of such companies depends on free, open and non-discriminatory access to a single, unified national marketplace, unfettered by threats of over-reaching regulation and taxation. This Court has made clear that § 1983 is fully available to address Commerce Clause violations. *Dennis* v. *Higgins*, 498 S.Ct. 439 (1992). This right would be defeated if the Tax Injunction Act were interpreted not only to remove federal jurisdiction over challenges to state tax laws, but to eviscerate all § 1983 relief in state tax cases.

B. *Requiring State Courts To Hear § 1983 Actions Would Also Deter Individual States From Wrongfully Interfering With The National Marketplace Created By The Commerce Clause.*

It is well-settled that the fee award authorized by § 1988 is "an integral part of the remedies necessary to obtain compliance with § 1983." *Maine* v. *Thiboutot*, *supra*, 448 U.S. at 11. *See also Pechiney Corp.* v. *Crystal*, *supra*, 643 A.2d at 322 (fee award provides "an additional incentive for the state to comply with the commands of the Constitution"). By affirming the right of direct marketers to assert claims under §§ 1983 and

[8] For this very reason, a number of state courts have upheld jurisdiction over § 1983 claims in state tax cases. In its well-reasoned decision in *Pechiney Corp.* v. *Crystal*, 42 Conn. Supp. 91, 643 A.2d 319, 322 (1994), the Superior Court of Connecticut (Tax Session) explained that, in the absence of § 1988 fee awards, "the state could more easily extract small sums unconstitutionally from its taxpayers. A taxpayer subjected to an unconstitutional tax of a few dollars would be better off paying it than incurring the necessary legal fees to challenge it." As the court explained, "Section 1988 provides a litigation incentive for taxpayers faced with unconstitutional tax assessments regardless of the resources of those parties. *See Gore* v. *Turner*, 563 F.2d 159, 164 (5th Cir. 1977)." *Id.*

1988, this Court would acknowledge the important role of these statutes in deterring unconstitutional state actions. Without the potential for attorneys' fees awards, state tax departments would be exposed to absolutely no "downside risk" from issuing unconstitutional tax assessments. Moreover, unless attorneys' fee awards are allowed, the most that can be accomlished from a challenge to an unconstitutional use tax assessment is a refund of taxes, penalties and interest which have already been paid, and perhaps a narrow declaration of rights to prevent future assessments based upon identical facts. The state will have suffered no loss. The need for deterrence is especially important for non-residents, since they make politically appealing targets for state legislatures and aggressive tax administrators.[9]

CONCLUSION

The Tax Injunction Act was never intended to limit the remedies available to constitutional litigants. To the contrary, the sole purpose of the Act was to afford state courts the exclusive opportunity to entertain constitutional objections to state taxation schemes and to provide litigants with all available

[9] For example, in *L.L. Bean, Inc.* v. *Pledger*, No. 91-2479, slip op. at 1 (Ch. December 8, 1994), the Arkansas Department of Finance and Administration continued to "treat Bean as a vendor required to collect and remit compensating use tax and to report to the Department regarding taxable transactions" despite the Department's acknowledging that the company lacked a "substantial nexus" with Arkansas. Even after *Quill*, the Department demanded "that Bean report sales and use taxes on its sales in July of 1992 and to remit payment together with a report of such sales to the Department by August 20, 1992." Slip op. at 2. As the Chancery Court found in ruling in L.L. Bean's favor and declaring the acts of state tax administrators unconstitutional, "the demand that L.L. Bean report and pay taxes . . . indicates that the violations could recur." Slip op. at 3.

constitutional rights and remedies before those courts. Indeed, the language of the Tax Injunction Act — which brings the bar to federal court jurisdiction into play only if the state court provides a "plain, efficient and speedy remedy" — was intended to make clear that taxpayers were not limited in their rights, but only in the *procedures* available to pursue those rights.

To interpret the Tax Injunction Act as anything other than a jurisdiction-shifting arrangement would deprive citizens of the single most effective means for vindication of their constitutional rights. If such a limitation is to be imposed upon citizens' abilities to pursue constitutional claims, it should be the result of a clear expression of legislative intent by Congress. It should not be the product of a strained judicial effort to extend the Tax Injunction Act beyond the clear bounds of its language by reading into the Act a subtle and implicit restriction never mentioned in its legislative history.

For the reasons stated herein, DMA asks the Court to reverse the decision of the Oklahoma Supreme Court in *Private Truck Council of America, Inc.* v. *Oklahoma Tax Commission*, 879 P.2d 137 (Ok. 1994).

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